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No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

ALBERT J. LOVSHIN,

Petitioner,

vs.

DEPARTMENT OF THE NAVY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stats. 1121, Chapter 43, which provides procedures for performance-based removal or demotions of Federal employees at Chapter 43, precluded Petitioner's removal under Chapter 75.

2. Whether Petitioner's removal for reasons of performance was precluded under 5 C.F.R. Section 831.1206 by the agency's retirement disability action, and therefore, could not be retroactively revived.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Merit Systems Protection Board is an Intervenor.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Albert J. Lovshin petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra* A) is reported at 767 F.2d 826 (Fed. Cir. 1985). The decision of

the Merit Systems Protection Board (App. *infra*, B) is not officially reported.

JURISDICTION

The judgment of the court of appeals (App. *infra*, C) was entered on June 21, 1985. On September 10, 1985, the Chief Justice extended the time within which to file a petition for writ of certiorari to and including November 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stats. 1121, Chapters 43, 75, 23 and 77; in pertinent part:

1. 5 U.S.C. Sections 4301, 4302, 4303 (App, *infra* D).
2. 5 U.S.C. Sections 7512, 7513 (App, *infra* E).
3. 5 U.S.C. Section 2301 (App, *infra* F).
4. 5 U.S.C. Section 7701 (App, *infra* G).
5. 5 C.F.R. Section 1206 (App, *infra* H).

STATEMENT

Petitioner, ALBERT J. LOVSHIN, (pronounced loo-SHEEN) was employed as a civilian electronics engineer, GS-12, at the Naval Ship Weapons Systems Engineering Station (NSWSES), Port Hueneme, California. After ten years of service, Lovshin was removed from his job. He submits his removal was unlawful.

1. *Agency Level Actions.* Petitioner's supervisors wanted to remove him from NSWSES. To accomplish their goal, the agency applied for a disability retirement with the

Office of Personnel Management (hereafter OPM) on October 21, 1981[1] (App. *infra* K). After giving Lovshin official notice of the application for disability retirement, the Agency also served Lovshin with a Notice of Proposed Termination of Employment based in part on "unacceptable performance" and in part "for the efficiency of the service" (App. *infra* J). The Agency then served Lovshin with Notice of Final Decision issued November 13, 1981, removing Lovshin from his employment for the reasons stated in the Notice of Proposed Termination, effective November 30, 1981.

The removal action was contrary to law, as provided in 5 C.F.R. 831.1206:

> An agency *shall* retain an employee in an active duty status until it receives the initial decision of the Associate Director for Compensation on the agency application for disability retirement. . . . [Emphasis Added]

The agency did not receive initial approval of the application for disability until January, 1982.

Lovshin filed an appeal of the adverse removal action to the Merit Systems Protection Board (hereafter MSPB) on December 10, 1981. On or about January 8, 1982,[2] the agency cancelled the removal action and placed Lovshin on retirement disability. The agency moved to dismiss

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[1] See 5 CFR Section 831.1201 *et seq.*

[2] The cancellation date of the removal action is uncertain. The date stamps on OPM's initial letter approving the disability retirement indicate that it was mailed January 6, 1982, and received by the Department of the Navy on January 11, 1982. However, the two standard form 50's (notification of personnel action forms cancel the removal action and place petitioner on retirement disability, bear the date January 8, 1982.

petitioner's appeal as moot, since the adverse removal action had been cancelled due to the approval of the agency initiated disability application. MSPB dismissed the appeal for lack of jurisdiction on February 23, 1982.

Lovshin timely requested reconsideration of the OPM's initial decision involuntarily retiring him. On July 23, 1982, the OPM reversed its initial decision and disallowed the agency's application for retirement disability. The agency thereafter sought and was granted reconsideration by the OPM. On July 1, 1983, the OPM issued its Final Decision disallowing the agency application for disability retirement. On September 2, 1983, the agency notified Lovshin it was reinstating the removal action retroactively, effective November 30, 1981. Lovshin was neither on active duty status nor retirement disability from July 23, 1982 (the date OPM reversed its initial approval of the agency's application for retirement disability) through September 2, 1983.[3]

2. *Proceeding in the Merit Systems Protection Board.* Petitioner appealed the retroactive reinstatement of the removal action to MSPB on September 22, 1983. The appeal was heard by Thomas J. Mangan, Presiding Official. The Presiding Official stated at the beginning of the proceeding:

> Mr. Albert J. Lovshin is appealing the action of the Department of the Navy which removed him from his position for unsatisfactory performance under the provisions of Title 5, Code of Federal Regulations, Part 432 [Chapter 43]. (bracketed matter added)

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[3] The Agency did not officially cancel the retirement disability until September 2, 1983.

However, the transcript of the proceedings as they progressed manifestly demonstrates that the parties and the Board were confused as to whether the removal action was taken under Chapter 43 or Chapter 75.

This confusion is evidenced by the agency's belief that the burden of proof was by "substantial evidence." The agency representative stated:

> The Agency's position is that it followed the proper procedures in effect (sic) Mr. Lovshin's removal and his removal was supported by substantial evidence that his performance was not satisfactory.

Nowhere in the transcript is the burden of proof stated to be by "the preponderence of the evidence," the test required under Chapter 75. However, in his Decision, the Presiding Official states:

> The issue presented in this appeal is whether the agency has met its burden of proving the charge of unsatisfactory performance by the preponderance of the evidence of record. (App., *infra*, B-4).

The Presiding Official concluded that the agency had not secured approval of its performance appraisal system by OPM (App. *infra* B-3).[4] This conclusion was erroneous. The Department of the Navy had secured approval from the OPM. *See Gende v Department of Justice*, 23 MSPR 604 (1984) at page 614, footnote 13. The testimony of the head of Personnel Operations Division at NSWSES, Michael Byron (App. *infra* I) and Stanley Garrow, Lovshin's supervisor, clearly indicate that the agency's

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[4] Performance appraisal systems are required by Chapter 43.

performance appraisal systems were in place on October 1, 1981. Witness Garrow said:

> I guess I did a year-end performance appraisal. It concerns — The subject of this is "Performance Appraisal" and "Your performance evaluation will be based on the new basic performance appraisal program mandated by the Civil Service Reform Act in accordance with Reference 'A', that was the one that cited it: "You are to receive a close-out evaluation under the old system. Accordingly, enclosure one is your evaluation under the old system.

CT page 147, lines 2-9.

Based on his conclusion that the agency had not secured OPM approval of its performance appraisal system, the Presiding Official decided that the agency could retroactively remove Lovshin for unsatisfactory performance or inefficiency under Subpart D of Part 752 (App. *infra* B-4).[5]

The Presiding Official also found that the retroactive reinstatement was proper and in accordance with the regulations (App. *infra* B-9). He affirmed the removal action in his initial decision issued January 20, 1984; the decision became final on February 24, 1984 (App. *infra* B-11).

3. *Proceeding in the Court of Appeals for the Federal Circuit.* Lovshin had the option to appeal the Presiding Official's decision to the Board, but instead appealed to the United States Court of Appeals. He argued the agency had

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[5] The Presiding Official ignored the exceptions to Subpart D of Part 752, specifically, 5 C.F.R. 752.401 (c)(5), in pertinent part: (c) *Exclusions*: The subpart does not apply to . . .the following: . . .(5) Involuntary retirement because of disability under Part 831 of this title.

failed to meet its burden of proof under *either* Chapter 43 or Chapter 75, and had in fact taken the removal action in retaliation for Lovshin's annoying "whistleblowing" reports.[6] He also argued that the Presiding Official had committed harmful error in admitting certain evidence offered by the agency in violation of Chapter 43, and had thus denied Lovshin the due process of law afforded him by Chapter 43.

Argument was set for Tuesday, November 6, 1984 (Election Day) before a three-judge panel of the Federal Circuit. On October 22, 1984, however, MSPB had issued its decision in *Gende, supra.* Despite the valiant efforts of court and counsel to avoid *Gende,* since Lovshin's counsel had not yet seen the decision, the case was a major part of oral argument.

The court entertained supplemental briefs from counsel on the impact of *Gende.* MPSB for the first time in its history intervened, and also briefed the issue.[7]

The Federal Circuit, without notice to counsel and an opportunity to reargue, decided Lovshin's appeal in banc. (*Lovshin,* 767 F.2d at 829.) Lovshin found the entire three-judge panel which had heard oral argument — in the dissent.

Judge Nies, writing for the majority, found that, despite Congress' enactment in Chapter 43 amendments, of an entirely new and specific mechanism for the removal or demotion of Federal employees, with both safeguards for employees and concessions for agencies, those employers could continue to remove and demote employees under the

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[6] 5 U.S.C. 2301(b)(9)(A), *infra.*

[7] MSPB requested the court to remand as *Lovshin* may have been improperly decided under Chapter 75.

creaky and ritual-shrouded Chapter 75 system Congress had so roundly and soundly criticized.

The majority summarily dismissed the careful rationale of *Gende*.

Extracting language from agency and court decisions directed solely at "window period" agency actions (767 F.2d 840), the majority decided that MSPB had violated its own and the Federal Circuit's precedents in *Gende*, and declined to accord MSPB the deference to which the agency is entitled.[8] The majority concluded that Congress had not adequately expressed its intention that performance-based removals and demotions were to be governed exclusively by Chapter 43. It wrote that Chapter 75 had always been used for performance-based removals and Congress had not "repealed such use" (767 F.2d at 829). The majority found no "necessary" conflict between the two systems.

Judge Nies made clear that the court was substituting its judgment for that of Congress, when she concluded that there must still be a mechanism for removing employees whose job performance was not quite "up to snuff" but was not "unacceptable", as defined in Section 4301(3):

> "Unacceptable performance" means performance of an employee who fails to meet established performance standards in one or more critical elements of such employee's position.

In contrast, the five judges in the dissent recognized that Congress' years of work in reforming the removal procedures of the civil service for poor work[9] should not be cast aside at the whim of the agency, and the old system

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[8] *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *United States v. Rutherford*, 442 U.S. 544, 553 (1979).

[9] *Gende v. Department of Justice*, 23 MSPR 604 (1984) at page 614.

resurrected. Senior Judge Skelton, who was on the panel at Lovshin's oral argument, wrote,

> A study of the legislative history of the Act clearly indicates that Congress intended that performance-based removal and demotion actions be effected exclusively under Chapter 43 procedures. One of the main purposes of the Act was to simplify and expedite procedures against employees whose work and performance was substandard. *See* S.Rep. No. 95-969, 95th Cong., 2d Sess. 2 (1978), reprinted in House Comm. On Post Office and Civil Service, 96th Cong. 1st Sess, *Legislative History of the Civil Service Reform Act of 1978*, at 1466 (Comm. Print. No. 96-2, 1979) (herein referred to as *Legislative History*.).

767 F.2d at 850-851.

Judge Newman, also dissenting, found the answer even more plain:

This decision turns solely on determination of the intent of Congress. Did Congress intend when it stated:

> "Actions based on unacceptable performance are governed by Chapter 43 . . .*" to mean that actions based on unacceptable performance are governed by either Chapter 43 or Chapter 75 at the option of the agency?
>
> [*S. Rep. No. 969, 95th Cong. 2d Sess. 46, reprinted in 1978 U.S. Code Cong. & Ad. News 2723, 2768.]
>
> . . .
>
> I agree with the analysis and conclusion of Judge Skelton's dissenting opinion, that this case must be remanded because Chapter 43 is the exclusive

> procedure for performance-based actions. That analysis is logical, it is simple, and it comports with the text of the Act and with the legislative history, which states:
>
> "[No] employee will be disciplined when performance standards and critical elements have not been adequately defined by an agency."
>
> H.R. Rep. No. 1403, 95th Cong. 2d Sess. 21 (1978). In this I agree also with the analysis in *Gende* of the purposes and interpretation of the 1978 Act.

767 F. 2d 852.

REASONS FOR GRANTING THE PETITION

1. This case presents issues of substantial public importance and of great concern to all Federal employees and all agencies subject to the Civil Service Reform Act of 1978. Congress intended that as of October 1, 1981, 5 U.S.C. Section 4303 supersedes 5 U.S.C. Section 7513 for personnel removals and demotions based on unacceptable performance. The *Lovshin* decision is contrary to Congressional intent and presents an important question of federal law which should be answered by this Court.

The Civil Service Reform Act became effective on January 11, 1979. However, Congress provided that agencies did not have to have their performance appraisal systems, required by Section 4302, in place until October 1, 1981.[10] Because of this statutorily created "window period", confusion developed when agencies attempted adverse

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[10] 5 U.S.C. Section 4302 (b)(2).

personnel actions based on unacceptable performance before their performance appraisal systems were approved by OPM and in place.

MSPB sought to remedy the situation by its decision in *Wells v. Harris*,1 M.S.P.R. 199 (1979). *Wells* was intended to apply as an interim measure which would allow agencies to continue to process adverse personnel actions under Chapter 75 until their respective performance appraisal systems were established.

> Although *Wells* contained language that has been broadly interpreted as allowing the invocation of Chapter 75 for any performance-based actions at any time, *see Wells* at 236, that decision specifically addressed only regulations which established interim procedures in effect before October 1, 1981. Hence, the decision in *Wells* neither directly addressed nor resolved the question of whether Chapter 75 was available for performance-based actions effected after October 1, 1981.

Gende, supra, 23 MSPR 604 at 609.

After the *Wells* decision, the various circuit courts and the MSPB rendered decisions which concerned adverse personnel actions which occurred prior to October 1, 1981.[11]

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[11] *Drew v. U.S. Department of the Navy*, 672 F.2d 197 (D.C. Circuit, March 5, 1982) action date July 9, 1979; *Darby v. Internal Revenue Service*, 672 F.2d 197 (D.C. Circuit, March 5, 1982) action date July 13, 1979; *Turnage v. Department of Agriculture*, 230 Ct.Cl. 799 (Court of Claims, 1982) action date February 1, 1979; *Kochanny v. Bureau of Alcohol, Tobacco and Firearms*, 694 F.2d 698 (Federal Circuit, November 29, 1982) action date May 11, 1979; *DeBose v. Department of Agriculture*, 700 F.2d 1262 (Ninth Circuit, March 8, 1983) action date May 1980; *Hatcher v. Department of the Air Force*, 10 MSPR 159

These decisions all allowed for adverse personnel actions under Chapter 75 before October 1, 1981. There is no precedent among these cases for Chapter 75 agency actions based on unacceptable performance commenced after October 1, 1981.

The D.C. Circuit interpreted *Wells* to address interim actions in *Drew, supra*, 672 F.2d 197 at 201:

> . . .In amending Chapter 43 in 1978 by establishing the aforementioned performance appraisal systems, Congress stipulated that such systems need not be fully implemented until October 1, 1981. Until such systems were established, *Wells* held that federal employees could not properly be dismissed under Chapter 43 and that *in the interim* Chapter 75 dismissals could proceed on performance-based grounds. . . .(emphasis added)

Drew is consistent with *Gende*, which is the only precedent which dealt with an agency action based on unacceptable performance occurring after the Congressional deadline of October 1, 1981. The Federal Circuit decision in *Lovshin* is the only appellate opinion which holds that Chapter 75 may be used after October 1, 1981 to sustain a personnel termination based on unacceptable performance.

2. Review by this Court is especially appropriate here because the decision below departs from the well-established principle that an administrative agency's construction of the statutes it is charged with administering is due substantial deference. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *United States v. Rutherford*, 442 U.S. 544, 553

(MSPB, April 21, 1982), 705 F.2d 1309 (Eleventh Circuit, May 26, 1983) action date August 8, 1980.

(1979). The Merit Systems Protection Board is charged with hearing personnel matters under Chapter 75 and Chapter 43. MSPB set forth interim administrative guidelines in *Wells*, which were heeded by the courts. Its decision in *Gende*, construing the CSRA requirements after October 1, 1981, should likewise be followed. The Federal Circuit, without warrant, failed to accord the Merit Systems Protection Board's views the deference they were due.

3. The *Lovshin* decision is inconsistent with the Federal Circuit's earlier and later decisions in its interpretation of Congress' intent.

The Court itself, and its predecessor, the Court of Claims, understood that performance-based removal actions belonged under Chapter 43. In *Turnage, supra*, the court (by Davis, Nichols and Smith, now members of the Federal Circuit) reviewed a removal action taken under Chapter 75. The MSPB found Chapter 43 should have been used. The agency appealed. The Board, after deciding *Wells v. Harris*, reopened for the agency to make proofs under Chapter 75, and Turnage was removed.

The Court, in reviewing this flip-flop, acknowledged, "It is clear that *Chapter 43* was intended to cover (at least, eventually) employees like petitioner. 5 U.S.C. Section 4301(2)." *Turnage, supra*, 230 Ct.Cl. at 801. It upheld the removal, nevertheless, declining to disturb the MSPB's ruling in *Wells v. Harris*, that removals under Chapter 43 were unlawful until the performance appraisal systems required thereunder were approved by OPM. Chapter 43 removals could not be based upon an agency's interim systems.

In *Kochanny v. Bureau of Alcohol, Tobacco and Firearms*, 694 F.2d 698 (Fed. Cir. 1982), the court again had before it only the limited question whether an agency removal,

reversed under *Wells v. Harris* and then executed under Chapter 75, was valid. The interim regulations of the agency were again before the Court, not the final, approved Chapter 43 systems.

The MSPB's *Gende* decision thus did not conflict with the Circuit's precedent, contrary to Judge Nies' opinion. *Lovshin*, 767 F.2d at 840. The *Turnage* and *Kochanny* decisions plainly were based upon interim regulations, and the MPSB's decision in *Wells v. Harris*.

Nor did *Gende* conflict with *Wells v. Harris*. The plain language of that decision limits its scope to *interim* regulations. The majority in *Lovshin* ignored contextual references in quoting *Wells*, with the result that MSPB's limiting language was expanded beyond its intent. *Compare* the first complete sentence at 767 F.2d 837 *with* the second complete paragraph at 1 MSPR 202; *compare also* the omitted matter of the *Wells* quotation at 767 F.2d 837 *with* 1 MSPR 235-236. It becomes clear that *Wells* was intended to make sense out of nonsense during the interim period. Employees and agencies both were wrong when they argued Chapter 75 was not available to govern the window period between enactment of Chapter 43 and its implementation.

The *Wells* board did not speculate or assume that agencies would *violate the law*, by not having their appraisal systems in place on October 1, 1981. Saying *Gende* contradicts *Wells* forces this conclusion.

Congress had logical reasons for leaving Sections 7512(1) and (3) as they were. It had to provide for non-performance based removals and demotions. It understood as well that the implementation of the Chapter 43 amendments would take time and that therefore Chapter 43 removal actions could not occur until the system was in place. It therefore

provided Section 7512 as a continuing basis for removal actions until a basis could be provided under Chapter 43.

The Federal Circuit itself in a recent case has acknowledged that the intent of Congress was to replace the old system with a new one, precisely because personnel "actions" were so difficult under the old system. *Wilson v. Department of Health and Human Services*, 770 F.2d 1048 (Fed. Cir. 1985), at pages 1050-1052.

4. Congress' express mandate was that agencies must develop performance appraisal systems, *and* must "use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting *reducing in grade*, retaining *and removing* employees." Section 4302(a)(3). The *Lovshin* decision provides, however, that agencies *need not* use these performance appraisal systems to remove or demote employees, as long as they comply with the higher standard of proof contained in Chapter 75. *Lovshin*, 767 F.2d at 837. The decision thus countermands Congress' marching order to implement the Chapter 43 system.

There is no other conclusion possible. Some "hybrid procedure", using parts of Chapter 43 for ratings, and Chapter 75 for proofs, is illogical in the extreme. This was acknowledged by the Board when they confronted the same option in *Gende*:

> Any conclusion that congress intended to create, *sub silentio*, a hybrid category of performance-based actions in lieu of, or in addition to, Section 4303 actions is simply untenable at this point in time. *See Drew, supra*, at 206 (Mikva, J., dissenting) "(It is not for this court or the Board to fashion a hybrid procedure and pronounce that it is just as good as anything Congress can do.)" Such an intepretation would render Chapter 43

> meaningless since agencies taking performance-based Chapter 75 actions could freely disregard the procedures which Congress provided for Section 4303 actions and could likewise ignore the clear statutory requirements in Section 4302 mandating that the results of agency performance appraisal systems be utilized as the basis for making decisions to retain or remove employees. . . .We believe that to allow agenices unfettered discretion in choosing to ignore such benefits could only have the effect of frustrating Congressional intent.

Gende, supra, 23 MSPR at 614.

5. The Federal Circuit's decision affirming the retroactive reinstatement of Lovshin's removal warrants review by this Court because it sanctions clear abuse of the legislated structure of Federal employee disability retirement. The Civil Service Reform Act is thus, further undermined.

The agency's two actions, initially applying for disability retirement and subsequently removal, are analogous to the facts in *Vitarelli v. Seaton,* 359 U.S. 535, 539 (1958) where this Court stated:

> Having chosen to proceed against petitioner on security grounds, the Secretary here, as in *Service,* was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily.

The clear language of 5 C.F.R. Section 831.1206 (App. *infra* H) and the logic of *Vitarelli* renders the retroactive reinstatement of Lovshin's removal void *ab initio.*

6. Review by this Court is also warranted because the interpretation of Chapters 43, 75, 23 and 77 adopted by the

court below raises serious constitutional issues that can and should be avoided. *County Court of Ulster County v. Allen*, 442 U.S. 140, 149 (1979); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979). The Federal Circuit unnecessarily raised constitutional concerns of procedural and/or substantive due process of law by announcing that Chapter 77, specifically, Section 7701 (c)(2)(B), implements the merit principles defined in Chapter 23.

Furthermore, Judge Skelton's dissent foreshadowed the raising of serious constitutional questions at 767 F.2d 846:

> . . . This is a very important case in which the MSPB has intervened, and one that should not be lightly considered. The case is important because the majority opinion deprives government employees in the competitive service of certain rights granted to them by Congress in 1978 when it amended Title 5, Section 4303 (Chapter 43) governing removal proceedings by an agency against employees for unacceptable performance. . . .

Those rights described by Judge Skelton include:

— 30 days' advance written notice of the agency's proposed action, Section 4303(b)(1)(A);

— an opportunity to improve, Sections 4302(b)(6) and 4303(d);

— a limitation to consideration only of performance which is unacceptable, Section 4303(b)(1)(A)(i), and which occurred within the past year, Section 4303(c)(2)(A).

These rights constitute the due process of the statute afforded Federal employees who are threatened with removal or demotion. In subscribing specific procedures only for these disciplinary measures, Congress expressed its

intent to give agencies the freest rein possible in disciplining Federal employees, while balancing the employees' need for minimum procedural protection. Congress recognized that one's work is a basic human right, and afforded employees these statutory protections. Performance-based proceedings under Chapter 75 will deny those very employees who were intended to benefit from these statutes, the protections afforded by Chapter 43.

Thus, the *Lovshin* decision raises the spectre of denial of due process. This dilemma is avoided by a more logical interpretation of the CSRA that only Chapter 43 governs performance-based removals and demotions.

7. This case presents a question of administrative importance throughout the Federal service.

The illogical consequences of the *Lovshin* decision in disciplining employees for poor work will create chaotic and inconsistent enforcement and will adversely affect the morale of approximately 1.8 million Federal workers.

For example, under the *Lovshin* rationale, an employee whose performance is "unacceptable" is entitled to a 30-day opportunity to improve before he can be removed, Section 4303(d) and Section 4302(b)(6). But an employee whose performance is not "unacceptable" can be removed without being given an opportunity to improve!

For another example, an employee removed for "unacceptable" performance can be so disciplined only for instances of unacceptable performance which occurred within one year of the notice of action, Section 4303(c)(2)(A). Under the *Lovshin* rationale an employee whose performance is acceptable can be removed for instances unlimited in time. This is precisely what happened to Lovshin. The Presiding Official allowed testimony

concerning instances of Lovshin's alleged poor performance three years back.

Where one interpretation of an ambiguous statute leads to a fair result, and another to an unfair result, rules of statutory construction compel the interpretation that leads to fairness. *Cf. Mastro Plastics v. Labor Relations Board*, 350 U.S. 270, 287 (1955); *U.S. v. Shaughnessy*, 338 U.S. 521, 534, (1949) (Mr. Justice Frankfurter, dissenting); *see also* 73 Am. Jur. 2d section 260.

The majority's view that the newly enacted merit system principles of Chapter 23, will somehow protect employees from this result is impractical and unworkable. 767 F.2d 826. If, as stated in Merit Principle 6, Section 2301(a)(6), ". . . inadequate performance should be corrected . . ." there should be no removal action for "inadequate", but not "unacceptable" performance. The majority's insistence on retention of performance-based actions under Chapter 75 is thus unnecessary.

The decision below eliminates the core of the Civil Service Reform Act, Section 4303, as the exclusive means for effecting performance based adverse personnel actions.[12] There can be no "reform" in the Civil Service Reform Act where the centerpiece of the legislation has been gutted, becoming a mere option at the whim of agency managers.[13]

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[12] "As will be shown more fully below, this holding is contrary to, and violates both Chapter 43 and Chapter 75 . . . Accordingly, the majority opinion adversely affects both employees and agencies." *Lovshin* at 846 (Skelton, J., Dissenting).

[13] *Gende v. Department of Justice, supra* 23 MSPR at 614.

The court below authorizes the use of either Chapter 43 or 75 or both.[14] The result will be to continue the confusion graphically demonstrated by Petitioner Lovshin's predicament, as shown by comments made by the Presiding Official.

> The one factor that's very difficult to understand is when the Civil Service Reform Act of 1978 came in they said We're going to set up a whole new, complete reevaluation system of all government employees and this was a great idea, however, to carry this to fruition became almost an impossibility because as you heard before they said, We'll use — everybody will use these same forms, and its like matching apples and oranges in many cases and so, consequently, it created an awful lot of supervisory problems to administer that program, to set up the so-called critical elements and standards of performance and it also became a burdensome task for the employees because they were asked at the same time to analyze it and put in their suggestions, sit down and come to an agreement as to what their job standards would be and this, believe me, caused more confusion than it was worth.

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[14] *Lovshin* at 843: "We also see nothing in the statute to prevent the agency from bringing a mixed case, for example, relying on Chapter 43 for "unacceptable performance," in a critical element with an alternative, or additional charge, under Chapter 75 for such cause as will promote the efficiency of the service."

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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November, 1985

APPENDIX A

United States Court of Appeals for the Federal Circuit

ALBERT J. LOVSHIN,

Petitioner,

vs. Appeal No. 84-1002

DEPARTMENT OF THE NAVY,

Respondent

Douglas Stenzel, of Ventura, California, argued for petitioner.

Charles Schlumberger, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for respondent. With him on the brief were *Richard K. Willard*, Acting Assistant Atttorney General, *David M. Cohen*, Director and *M. Susan Burnett*.

Dale Birdoff, of Department of the Navy, of Washington, D.C., of counsel.

Evangeline W. Swift, General Counsel, *Mary L. Jennings*, Associate General Counsel for Litigation and *Marsha E. Mouyal*, Office of the General Counsel, Merit Systems Protection Board, of Washington, D.C., were on the brief for intervenor, Merit Systems Protection Board.

Appealed from: Merit Systems Protection Board

United States Court of Appeals
for the Federal Circuit

ALBERT J. LOVSHIN,

Petitioner,

vs. **Appeal No. 84-1002**

DEPARTMENT OF THE NAVY,

Respondent.

DECIDED: June 21, 1985

Before MARKEY, *Chief Judge*, FRIEDMAN, RICH and DAVIS, *Circuit Judges*, SKELTON, *Senior Circuit Judge*, BALDWIN, KASHIWA, BENNETT, *Circuit Judges*, MILLER* *Senior Circuit Judge*, SMITH, NIES, NEWMAN and BISSELL, *Circuit Judges*.**

NIES, *Circuit Judge*.

I.

In this appeal, this court must consider the effect of amendments to Chapters 43 and 75 of Title 5 made by the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1121 (CSRA). Petitioner, Albert Lovshin, was removed

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* Judge Miller assumed senior status effective June 6, 1985.

** This case was argued before a panel consisting of Kashiwa and Miller, *Circuit Judges*, and Skelton, *Senior Circuit Judge*, on November 6, 1984. The need for clarity in the law has prompted this court to consider this case *in banc*.

from his position as Electronics Engineer for the Department of the Navy (agency) at the Naval Ship Weapons Engineering Station, Port Hueneme, California, effective November 30, 1981. On appeal to the Merit Systems Protection Board (MSPB or board), the agency action was sustained as meeting the standards and procedures required by Chapter 75 of the CSRA. As originally briefed on appeal, petitioner asserted that (1) the agency charge of unsatisfactory performance in his work was not proved, (2) the removal action was in retaliation for petitioner's whistle-blowing activities, (3) the agency committed harmful error in its removal procedures, (4) the presiding official of the MSPB violated procedural due process in the manner of conducting discovery and the hearing, and (5) the agency improperly removed him during the pendency of an agency-initiated disability retirement application. The agency argued that the presiding official's decision was correct in all respects and should be upheld.

Subsequently, the MSPB was allowed to intervene in this appeal. The MSPB asks that this case be remanded because it may have been improperly considered under Chapter 75. In *Gende v. Department of Justice*, 23 M.S.P.R. 604 (1984), a decision issued on October 22, 1984 during the pendency of this appeal, the board held that Chapter 43 was the exclusive procedure for performance-based actions *effected* after October 1, 1981, and that Chapter 75, with several exceptions, was no longer available after that date for effecting such actions. Because the action against petitioner Lovshin was performance-based and was effective on November 30, 1981, this action *prima facie* falls within the *Gende* ruling. If the case is remanded, the MSPB states that the agency would be allowed to show, if it could, that, *in effect*, it complied with Chapter 43 or that the action falls

within one of the exceptions the MSPB has stated to the *Gende* rule.

Petitioner and the agency were allowed to file supplemental briefs on this issue. Petitioner endorses the MSPB statutory interpretation but argues against remand on the ground that the removal action is irretrievably defective because the agency's performance appraisal systems under Chapter 43 were not in place until after his removal. The agency argues that, under the precedent of this court set forth in *Kochanny v. Bureau of Alcohol, Tobacco and Firearms*, 694 F.2d 698 (Fed. Cir. 1982) and in *Turnage v. United States*, 230 Ct. Cl. 799 (1982), Chapters 43 and 75 are alternative methods for removal of employees for performance-based reasons, and that the MSPB's interpretation of the statute in *Gende* is in error.

Having taken the case in banc because endorsement of *Gende* would required modifying the precedential analysis in *Kochanny* and *Turnage*, we reaffirm that Chapter 75 may be used to remove an employee for performance-based reasons, provided the agency meets all requirements for establishng "such cause as will promote the efficiency of the service."

In sum, we conclude that (1) the usual deference which a court must give the interpretation of a statute by the agency charged with its administration is not appropriate in this instance because the MSPB itself has not taken a consistent position; (2) the predecessor of Chapter 75 was long used for removals based on poor performance and the legislative history discloses no expressed intent by Congress to repeal such use; (3) Chapters 43 and 75 establish separate *procedural* mechanisms, both of which can be used to obtain the objectives Congress sought in enacting the CSRA; (4) there is no necessary conflict in utilizing both

chapters for such actions; and (5) if Chapter 43 only were available for the disciplining of employees for poor performance, there would be serious omissions and anomalies.

On the merits of this case, we hold that the removal action against petitioner Lovshin must be sustained. However, an issue has been raised with respect to petitioner's entitlement to pay under 5 C.F.R. § 831.1206 prior to OPM's decision on an involuntary disability claim. We find it appropriate to remand for determination of this issue in the first instance by the MSPB.

II.

The Civil Service Reform Act

This case raises a question of statutory interpretation of the effect of the CSRA amendments to Chapter 43 on Chapter 75. As background to this analysis, we begin with a brief review of the history and purpose of these chapters.

Chapter 43, before and after enactment of the CSRA, is directed to the *evaluation* of a federal employee's work performance. Chapter 75, before and after enactment of the CSRA, is concerned with removals and other disciplinary action.

The substantive ground for taking an adverse action under Chapter 75 has been in the civil service law essentially unchanged since 1912 with enactment of the landmark Lloyd-LaFollette Act. A single basis for disciplinary action has been continuously provided therein: "only for such cause as will promote the efficiency of the

service." 5 U.S.C. § 7513(a).[1] No limitation on the type of wrongful conduct by an employee which might lead to disciplinary action "for cause" is specified in Chapter 75. Poor performance of the duties of a position has been an accepted basis and, indeed, Chapter 75 provided the only framework for disciplinary action for performance reasons prior to the CSRA amendments to Chapter 43.

A formal system of periodic rating of a federal employee's work performance has long been part of civil service procedures. The pre-1978 provisions of Chapter 43 required an agency to rate the overall work performance of an employee as "satisfactory," "unsatisfactory," or "outstanding." 5 U.S.C. § 4301 *et seq.* (1976). A performance rating of "unsatisfactory" was stated to be "a basis for removal." 5 U.S.C. § 4304(b) (1976). Before rating an employee "unsatisfactory," an agency was required to give the employee 90 days warning and a reasonable opportunity to improve. An "unsatisfactory" *rating* was reviewable through review procedures in the agencies and the Civil Service Commission.

A provision relating to removal based on an "unsatisfactory" *rating* has been part of the evaluation chapter since the Performance Rating Act of 1950, codified at 5 U.S.C. § 2001 *et seq.* (1952).[2] The 1950 statute stated that an "unsatisfactory" performance rating "shall serve as

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[1] *Cf.* 37 Stat. 555 (1921): "no person in classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service." The immediate predecessor language can be found in 5 U.S.C. § 7501(a) and § 7512(a) (1976) with respect to employees in the "competitive service" and "preference eligible employees," respectively.

[2] For a history of performance rating, see App. I to H.R. Rep. No. 2162, 81st Cong., 2d Sess. 13 (1950).

a basis for removal." 5 U.S.C. § 2005 (1952). The provision was interpreted by some agencies as providing an independent basis for removal. However, that presumption was short-lived. The U.S. Court of Claims, as well as other courts, held that it did not. After an "unsatisfactory" rating was upheld through review procedures, an agency could use the *rating* "as a basis for removal" only by thereafter taking action "for cause" under Chapter 75 (or Chapter 14 of the Veterans Preference Act, if applicable).[3]

The courts were also confronted with a question similar to that presented in this appeal: Were the rating *procedures* in Chapter 43 superimposed on actions under Chapter 75, where the basis of the adverse action was performance-based? In a series of decisions, the courts held that the provisions for rating employees as part of the comprehensive system for promoting efficiency in the government service "did not directly or by implication modify or supersede the authority of the appropriate officials to demote [or remove] under procedures and regulations specifically applicable to personnel action of that character." *Jones v. Hobby*, 223 F.2d 345 (D.C. Cir. 1955).[4]

The pre-1978 Chapter 43 performance rating system was glaringly ineffective for managers and employees alike. As

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[3] *Chisholm v. U.S.*, 149 Ct. Cl. 8 (1960); *Atkinson v. U.S.* 144 Ct. Cl. 585 (1950); *Thomas v. Ward*, 225 F.2d 953 (D.C. Cir. 1955).

[4] *Accord, Seebach v. Cullen*, 224 F.Supp. 15 (N.D. Cal. 1963); *Alpert v. U.S.*, 161 Ct. Cl. 810, 816 (1963); *Allen v. U.S.*, 155 Ct. Cl. 598 (1961), and cases cited therein at 600; *Monday v. U.S.*, 146 Ct. Cl. 6 (1959); *Sells v. U.S.*, 146 Ct. Cl. 1 (1959); *McGinty v. Brownell*, 249 F.2d 124 (D.C. Cir. 1957); *Misuraca v. U.S.*, 135 Ct. Cl. 387 (1956); *Thomas v. Ward*, 225 F.2d 953 (D.C. Cir. 1955); *DeBusk v. U.S.*, 132 Ct. Cl. 790 (1955).

Congress stated, S. Rep. No. 969, 95th Cong., 2d Sess. 3, 40, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2725, 2762 (Senate Report):

> Assaults on the merit system have taken place despite, and in some instances because of, the complicated rules and procedures that have developed over the last century. The welter of inflexible strictures that have developed over the years threatens to asphyxiate the merit principle itself.
>
> The complex rules and procedures have, with their resultant delays and paperwork, undermined confidence in the merit system. Many managers and personnel officers complain that the existing procedures intended to assure merit and protect employees from arbitrary management actions have too often become the refuge of the incompetent employee. When incompetent and inefficient employees are allowed to stay on the work rolls, it is the dedicated and competent employee who must increase his workload so that the public may be benefitted. The morale of even the best motivated employee is bound to suffer under such a system. Moreover, the system's rigid procedures — providing almost automatic pay increases for all employees — makes it as difficult to reward the outstanding public servant as it is to remove an incompetent employee.
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> * * *
>
> In addition, few outstanding ratings are assigned because the statutory criterion requires

> outstanding performance in all aspects of the job, a criterion that extremely few individuals can meet. The unsatisfactory rating is little-used because the assignment of such a rating can have a useful purpose only with follow-on action which is usually time-consuming, expensive, and aggravating for all parties concerned. Under the provisions of 5 U.S.C. 4305, an employee is now entitled to an impartial review of the rating within the agency as well as a hearing before a board of review chaired by a member designated by the Civil Service Commission. This review and hearing process relates only to the rating itself. If an unsatisfactory rating is sustained through this process, and it is decided to remove the employee, such action must then be initiated and processed under the adverse action procedures. Thus, the entire process for taking action on the basis of unsatisfactory performance is slow. It serves as a deterrent to taking action that might otherwise be appropriate.

With these and other deficiencies in mind, Congress enacted "the most comprehensive reform of the Federal work force since passage of the Pendleton Act in 1883." Senate Report at 1, 1978 U.S. Code Cong. & Ad. News at 2723. For the first time, the merit principles, which had always been intended to underlie the Federal personnel system, were specifically enacted into law. Senate Report at 2, 1978 U.S. Cong. & Ad. News at 2724. The fervor with which Congress endorsed merit principles can be discerned in the section of the report headed "The Need For Reform." Recognizing the tension between "the rights of employees" versus the "need for management flexibility," Congress viewed the matter of reform and the importance

of merit principles not from the "limited perspective" of either employees or management, but from the advantage to the *public*, stating:

> Although it has recognized this tension, the Committee has viewed civil service reform from the standpoint of the public, rather than the more limited perspective of either the employee or manager. The "rights of employees" to be selected and removed only on the basis of their competence are concomitant with the public's need to have its business conducted competently. Similarly, the need for Federal executives to manage their personnel responsibilities effectively can only be justified by the benefit derived by the public from such management flexibility. An employee has no right to be incompetent; a manager has no right to hire political bed fellows [sic].
>
> The public has a right to an efficient and effective Government, which is responsive to their needs as perceived by elected officials. At the same time, the public has a right to a Government which is impartially administered. One of the central tasks of the civil service reform bill is simple to express but difficult to achieve: Allow civil servants to be able to be hired and fired more easily, but for the right reasons. This balanced bill should help to accomplish that objective. It is an important step toward making the Government more efficient and more accountable to the American people.

Senate Report at 4, 1978 U.S. Code Cong. & Ad. News at 2726.

The reforms in the civil srvice system made by the CSRA which are most pertinent to the issues in this appeal are those effected in Chapters 23, 43, 75, and 77, a summary of which follows.[5]

A.

Chapter 23

Chapter 23 establishes in law for the first time a codification of the merit principles of the Federal personnel system and the specific practices prohibited in the system. Agencies must adhere to a list of nine principles which include, *inter alia*, with respect to performance:

(a) Recruitment and advancement is to be based on relative ability, knowledge and skills, i.e., equal opportunity (§ 2301(b)(1)).

(b) Discrimination on the basis of political affiliation, race, color, sex, marital status, age or handicapping condition is prohibited and due regard must be given to rights of privacy and constitutional rights (§ 2301(b)(2)).

(c) Appropriate incentives and recognition are to be provided for excellence of performance (§ 2301(b)(3)).

(d) Employees are to be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards (§ 2301(b)(6)).

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[5] For convenience, the sections will be identified by these names or cited as codified in Title 5 (Supp. III 1979): Chapter 23 is § 2301, *et seq.*; Chapter 43 is § 4301, *et seq.*; Chapter 75 is § 7501 *et seq.*, and Chapter 77 is § 7701, *et seq.*

(e) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance (§ 2301(b)(7)).

(f) Employees must be protected against reprisal for "whistle-blowing" within an agency (§ 2301(b)(9)).

In § 2302 are listed specific "prohibited personnel practices." Employees with authority are prohibited, *inter alia*, from discriminating for or against employees on enumerated grounds, coercing political activity, defining the requirements of a position for the purpose of improving or injuring a particular person, engaging in nepotism, taking or failing to take a personnel action for purposes of reprisal, and finally, are subject to a broad prohibition which has been relied on in some of the decisions which will be discussed (§ 2302(b)(11)):

> (11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

The taking of a prohibited personnel practice by a particular employee with authority may be the basis for disciplinary action against him by the Merit Systems Protection Board, a new adjudicatory body, upon investigation and recommendation of the Special Counsel. Further, as will be discerned from the discussion of Chapter 77, an employee against whom action has been taken is given an important defense where that action is tainted by a prohibited personnel practice.

B.

Chapter 43

Chapter 43 amendments are sweeping and extensive. The old rating system which gave a single evaluation for an employee's overall performance (satisfactory/unsatisfactory/outstanding) was done away with. New Chapter 43 appraisals of performance are made more specific and, therefore, more meaningful. Agencies are required to develop and establish one or more appraisal systems for each category of position in the agency, establishing written performance standards for elements of such position together with a delineation of the "critical elements" for that type of position (§ 4302(b)).[6]

Agencies are encouraged to have employees participate in setting reasonable performance standards and delineating critical elements (§ 4302(a)(2)).[7] Agencies must communicate the performance standards and critical elements of positions to employees at the beginning of each evaluaton period (§ 4302(b)(2)). An employee's performance appraisal must be based on the particular standards for his position (§ 4302(b)(3)). Unlike the old system, which utilized a single adjective rating for overall performance, each element of performance is evaluated separately (5 U.S.C.

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[6] OPM approval of an agency's performance appraisal *system* is required (§4304(b)(1)). However, it is important to know that "such approval does not involve OPM review of the performance elements and standards established for each position." *See Siegelman v. HUD*, 13 MSPB 27 (1983).

[7] In the absence of a removal or reduction-in-grade action, however, no basis appears in the CSRA for a challenge to a standard. *See Alford v. HEW*, 1 MSPB 305 (1980).

§ 4303(b)(1)(A)(ii)). "Periodic appraisals" are required (§ 4302(a)(1)) and are generally expected to be made at least annually. Senate Report at 41, 1978 U.S. Code Cong. & Ad. News at 2763. *See* 5 C.F.R. § 430.204(e).

Section 4302(a) requires that performance ratings be used in connection with a wide variety of personnel actions. Specifically, § 4302(a)(3) directs an agency to:

> (3) use the results of performance appraisals *as a basis* for training, rewarding, reassigning, promoting, reducing in grade, retaining [in RIF's], and removing employees. [Emphasis and bracketed matter added.]

Only instances of "unacceptable performance" which occurred during the one-year period ending on the date of the notice of proposed removal or demotion may be considered in taking the action (§ 4303(c)(2)(A)).

To overcome the complexity of procedures under the old system whenever an agency attempted to use an "unsatisfactory" rating "as a basis for removal," agencies are now authorized by § 4303(a) to "reduce in grade or remove an employee for *unacceptable performance*," (emphasis added) and appeals from such actions may be taken directly to the MSPB pursuant to § 4303(e). Concomitantly, Chapter 75 was amended to provide specifically (§ 7512(D)) that Chapter 75 does not apply to a "reduction in grade or removal under section 4303." Thus, the two stage review under the old system — first under Chapter 43 to establish the validity of the *rating*, and then under Chapter 75 as an adverse action "for cause" — was disassembled.

It is important to emphasize at this point that the statutory term "unacceptable performance" in Chapter 43 is not a synonym for generally poor performance or

inefficiency. "Unacceptable performance" is one of only three terms Congress found appropriate to define in Chapter 43 — the other two being "agency" and "employee" which determine applicability. "Unacceptable performance" is a word of art specifically defined in § 4301(3) as follows:

> (3) "unacceptable performance" means performance of an employee which fails to meet established performance standards in *one or more critical elements* of such employee's position. [Emphasis added.]

The term "critical element" must also be understood as not meaning simply an important element of a job or position. As defined in the implementing regulations:

> "Critical element" means a component of a job consisting of one or more duties and responsibilities which contributes toward accomplishing organizational goals and objectives and which is of such importance that "Unacceptable" performance on the element would result in "Unacceptable" performance of assigned work.

5 C.F.R. § 430.203.

As further explained in the *Federal Personnel Manual*, at 430-3 (1980), denominating an element "critical" means that "performance below the minimum standard [in a 'critical element'] *requires* remedial action and *denial* of a within-grade increase, and may be the basis for removing or reducing the grade level of that employee. Such action may be taken without regard to performance on other components of the job."

Chapter 43 sets up a removal or demotion system on a different basis from and independent of Chapter 75:

> Section 4303 (a) imposes a new standard. It is "performance which fails to meet established requirements in one or more critical elements of the job." The Committee intends that this new standard should not be governed by the existing case law defining the present standard, "such cause as will promote the efficiency of the service."

Senate Report at 43, 1978 U.S. Code Cong. & Ad. News at 2765.

Thus, once an agency has set up an approved performance appraisal system, has communicated the written performance standards and "critical elements" of an employee's position to the employee at the beginning of the appraisal period, has warned of inadequacies in "critical elements" during the appraisal period, and has counseled and afforded an opportunity for improvement after proper notice, an agency may reduce in grade or remove an employee for receiving a rating of "unacceptable" *with respect to even a single* "critical element." No more is required of the agency; that is, a removal or demotion on the basis of an "unacceptable performance" *rating* on a "critical element " is not subject to any of the substantive or procedural requirements of Chapter 75.

Under Chapter 77, a Chapter 43 action is reviewable by the MSPB under the "substantial evidence" standard (§ 7701(c)). A Chapter 43 action is, thus, more narrowly reviewable by the board than a Chapter 75 case in which an agency must establish the facts underlying an adverse action by a preponderance of the evidence. Further, the agency need not prove that there is a nexus between the charge and the efficiency of the service, or that removal or demotion is an appropriate penalty.

Finally, it should be noted that the statute authorizes only the sanctions of removal or reduction in grade on the basis of "unacceptable performance." Lesser sanctions, such as suspension, are not authorized (§ 4303(a)).

C.

Chapter 75 Amendments

Chapter 75 was revised to spell out with greater particularity the procedural rights of employees when action is taken thereunder. The minimum rights to which an employee is entitled are set out in § 7513(b), which need not be discussed here.[8]

Chapter 75 was unamended, however, with respect to authorizing adverse actions against employees "for such cause as will promote the efficiency of the service" (§ 7513(a)).

§ 7512 sets out the scope of the cases which fall under Chapter 75:

§ 7512. Actions covered.

This subchapter applies to —

(1) a removal;
(2) a suspension for more than 14 days;
(3) a reduction in grade;
(4) a reduction in pay; and
(5) a furlough of 30 days or less;

but does not apply to —

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[8] The older procedures were upheld as satisfying due process in *Arnett v. Kennedy*, 416 U.S. 134 (1974).

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1206 or 7521 of this title.

Subsection D of § 7512 makes Chapter 75 not applicable to Chapter 43, a necessary provision to negate pre-1978 judicial precedent, and, thereby, make Chapter 43 independently operative. However, no provision in the CSRA tells us whether Chapter 43 does or does not negate or limit the previously recognized scope of Chapter 75.

With respect to that question, which is central to the issue raised by the MSPB, no *specific indication* of the intended effect of the new authority for taking action under Chapter 43 on the types of disciplinary actions to be taken under Chapter 75 appears in the legislative history. The legislative history advises, at best ambiguously, that Chapter 75 governs any action against an employee "where the basis for the agency action is *misconduct or any other cause besides unacceptable performance*. Actions based on *unacceptable performance* are governed by chapter 43." (Emphasis added.) Senate Report at 46, 1978 U.S. Code Cong. & Ad. News at 2768.

Consideration was given to, but no amendment was made in, the heavy burden of proof imposed on an agency in proceeding under Chapter 75. *See* H. R. Conf. Rep., 95th Cong., 2d Sess. 138-39, 1978 U.S. Code Cong. & Ad. News 2860, 2872 (Conference Report). Nor were the judicially imposed requirements for proof of a nexus between the basis for the adverse action and the efficiency of the service, or for consideration of the appropriateness of the penalty, or for consideration of mitigation of the penalty in light of personal factors, eliminated or alleviated.

D.

Chapter 77

Chapter 77 relates to appeals to the MSPB and judicial review and covers, *inter alia*, appeals under Chapter 43 and Chapter 75. Again we will forego delineating the myriad provisions here. Those in § 7701(c), pertaining to MSPB review of agency action, however, are significant to our subsequent analysis:

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision —

> (A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or
>
> (B) in any other case, is supported by a preponderance of the evidence.
>
> (2) Notwithstanding paragraph (1), the agency's decision may not be sustained under

subsection (b) of this section if the employee or applicant for employment —

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

As seen above, § 7701(c)(1)(A) and (B) spell out the respective burden of proof requirements for Chapters 43 and 75.

A major substantive change appears in § 7701(c)(2)(B), which specifically implements the merit principles discussed in connection with Chapter 23. Nothing comparable had existed in earlier statutes. If an employee can show that the agency's decision was based on a "prohibited personnel practice," that decision cannot be sustained. Thus, an employee is given, by this provision, a significant new defense to Chapter 75 actions, as well as to all other actions appealable under Chapter 77.

III

Prior Decisions Interpreting Chapters 43 and 75 under CSRA

The CSRA was made effecitve 90 days after October 13, 1978, the date of its enactment. However, with respect to implementation of Chapter 43, the statute provided in § 4302(b) that "each performance appraisal system shall provide for":

> (2) as soon as practicable, *but not later than October 1, 1981*, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;
>
> (3) evaluating each employee *during the appraisal period* on such standards. [Emphasis added.]

The reason for the grace period in implementing Chapter 43 is readily understandable. As explained by Vice Chair Poston, in his separate opinion in *Wells v. Harris*, 1 MSPB 199, 238 (1979):

> As the reform legislation progressed through Congress, it became apparent to a number of us that it would be imposible for the snail-like Federal bureaucracy to change overnight from the adjective performance rating system then in place, to the new performance standard/critical element system. Therefore, Congress provided that the requirement for a full performance appraisal system of proposed 5 U.S.C. § 4302 be postponed until 1981. In retrospect,the amendment designed to adopt this postponement was inadequately drawn . . . .

Two things, at least, seem clear from § 4302(b)(2) itself with respect to the significance of the October 1, 1981 date. An agency was encouraged to have its new appraisal sytem approved and operative as soon as possible before October 1, 1981, and that October 1, 1981, was the deadline for advising employees of the new standards and for beginning to make appraisals on *future* performance on that basis.

Following enactment of the CSRA, OPM issued regulations authorizing agencies to take actions under Chapter 43 once the agency had a new critical elements type evaluation system in place, even though not yet approved by OPM. In the *Wells* case, these regulations had been utilized for a removal action. The MSPB held that an agency could not remove an employee under Chapter 43 until its performance appraisal system received OPM approval. For an agency to attempt removal for "unacceptable performance" under Chapter 43 without an approved performance appraisal system was held to constitute "a prohibited personnel practice under § 2302(b)(11)." *Wells*, 1 MSPB at 230. Thus, OPM's regulations, which authorized agencies to take actions under Chapter 43 during the interim between the effective date of the statute and the date of the approval of its proposed performance appraisal system, were held invalid and actions by agencies pursuant thereto could not be sustained under Chapter 43.

Wells also held, however, that removals and demotions for performance-based reasons could continue, as before, under Chapter 75. After a review of the "sparse" legislative history, the MSPB rejected the argument that Congress intended that Chapter 75 no longer apply to performance-based actions at all. Rather, statements in the history merely indicated to the *Wells* board members that Chapter 75 did not apply to "unacceptable performance" removals, using the term as a word of art.

> Specifically, the MSPB stated:
> Reading these two sections [from Chapters 43 and 75] together, it is apparent that as used in both sections the term "unacceptable performance" is the term of art which is defined

> at § 4301. It is not a general term covering all types of poor performance. As we have ruled, if the process of Chapter 43 is not followed, "unacceptable performance" cannot be demonstrated. However if a determination of inadequate performance is not made under a performance appraisal system provided for in Chapter 43, then it may be processed as a Chapter 75 action.
>
> * * *
>
> Whichever action an agency chooses to pursue, it will have to comply with the procedural requirements of that Chapter. If an agency sees some advantage in pursuing performance-based action under Chapter 75, it is not inconsistent with the Act so long as the agency meets the higher burden of proof — and the more difficult standard of demonstrating that the action will promote "efficiency of the service." There is not the slightest evidence in the legislative history to suggest that Chapter 43 was ever to be a refuge for employees to escape Chapter 75. Chapter 43 originated as a relief measure for agencies and it was enacted for that purpose.

Id. at 235-36.

Thus, after *Wells*, deficiencies in performance continued to afford a basis for establishing "such cause as will promote efficiency of the service." The continued use of Chapter 75 for removals for performance-based reasons was specifically approved by this court, which also independently reviewed the legislative history and precedent of other

courts in reaching this decision. *Kochanny v. Bureau of Alcohol, Tobacco & Firearms*, 694 F.2d 698 (Fed. Cir. 1982). *See also Turnage v. United States*, 230 Ct. Cl. 799, 800 (1982) (Chapters 43 and 75 characterized as "two different mutually exclusive procedural routes for disciplining employees on the basis of unsatisfactory job performance.")

In *Gende v. Department of Justice*, 23 M.S.P.R. 604 (1984), the MSPB had before it a demotion action effective January 11, 1984. The agency had relied on Chapter 75 in demoting the employee on charges of careless workmanship and failure to follow agency policy and the National Electric Code, which allegedly resulted in a $4,000 loss to the agency. Petitioner Gende argued that the demotion was improper in that the agency had failed to follow certain Chapter 43 procedures, particularly, the requirement under Chapter 43 that an employee must be afforded an opportunity to improve before taking action. The presiding official upheld the demotion on the basis of the *Wells* decision, which he understood to hold that an agency may elect to bring a performance-based action under either Chapter 75 or Chapter 43. Thus, the *specific procedures* required under Chapter 43 were irrelevant. The MSPB accepted a petition for review recognizing that the board and several courts had interpreted the statute as providing agencies with an *option* to pursue performance-based actions under either Chapter 43 or Chapter 75.[9]

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[9] *See, e.g., Hatcher v. Dept. of Air Force*, 705 F.2d 1309 (11th Cir. 1983); *Debose v. Dept. of Agriculture*, 700 F.2d 1262 (9th Cir. 1983); *Kochanny v. Bureau of Alcohol, Tobacco & Firearms*, 694 F.2d 698, 701 (Fed. Cir. 1982); *Darby v. I.R.S.*, 672 F.2d 192, 195 (D.C.Cir. 1982); *Young v. Dept. of Navy*, 7 MSPB 7 (1981).

In *Gende*, the MSPB concluded that the precedent of this court in *Kochanny* and *Turnage* could be limited to performance-based actions taken during the change-over period since the court had no need in those appeals to address the exclusive application of Chapter 43 procedures for performance-based actions effected after October 1, 1981.

The MSPB then undertook to re-probe the congressional intent. While finding that "a review of the legislative history of the Reform Act [CSRA] indicates that Congress did not expressly state whether, in enacting Chapter 43, it was thereby prohibiting the use of Chapter 75 to effect performance-based actions," this time, contrary to *Wells*, it saw "persuasive indications" that Chapter 43 was intended to be the exclusive means to effect performance-based removals and demotions. Briefly, the indications relied on were references in the Senate Report to:

1. The aim of simplifying and expediting procedures.

2. Defects in old evaluation procedures.

3. Inordinate procedural requirements and unreasonable standards under Chapter 75.

4. Use of the revised performance appraisal system "as a basis for developing, rewarding, reasigning, [sic] demoting, promoting, retaining [in RIF], and removing employees."

5. Establishment of new procedures for actions based on unacceptable performance.

The MSPB perceived Congress's concern for employees to be protected from actions on "ad hoc" performance standards developed at the unreviewed discretion of agencies. It believed removal on the basis of such standards would be inconsistent with Congressional intent.

The MSPB also saw the Conference Report's discussion of the lesser burden of proof in "performance cases" vis-a-vis "misconduct cases" as an indication that this lesser burden should apply in all performance-based cases, which meant that all such cases would have to be treated as Chapter 43 cases. It also concluded that "unacceptable performance" was used interchangeably with "performance cases" in that Report and not as a word of art.[10]

Turning to the statute itself, the MSPB relied on the interpretative guide *expressio unius est exclusio alterius* and found it applicable to the relationship between Chapter 43 and Chapter 75. Since Chapter 75 did not apply to Chapter 43 actions and Chapter 43 provided specifically for removal and demotion for "unacceptable performance," it must follow, per the board, that Chapter 75 could no longer be used for performance-based actions. The board found the chapters otherwise impossible to reconcile.

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[10] The Conference Report is short on this point, and the portion which purportedly makes such usage is quoted below. The House had proposed a "preponderance of the evidence" burden in all cases. The Senate had proposed in "unacceptable performance" cases that the agency's decision must be upheld unless "there is no reasonable basis for the decision." The conferees agreed:

> that in performance cases a lower standard of proof should be required because of the difficulty of proving that an employee's performance is unacceptable. The conference substitute therefore provides that agency's decision in performance cases shall be upheld if its action is supported by substantial evidence in the record before the MSPB. The substantial evidence test was adopted both because it is clearly a lower standard than now used in performance cases and because it is a generally understood term in administrative law.

See Conference Report at 139, 1978 U.S. Cong. & Ad. News at 2872.

From this analysis, the board reached the following conclusion:

> In sum, the Board holds that Congress intended agencies to utilize Chapter 43 as the exclusive procedure for performance-based actions effected after October 1, 1981. We further hold that, in light of this Congressional intent, § 7513 provides no authority for agencies to effect such actions after October 1, 1981.

23 M.S.P.R. at 614-15. To the extent that a different interpretation had been espoused in *Wells*, it was so modified.

The board then went on to recognize exceptions to this basic rule. Where a removal was based on performance and non-performance (i.e, misconduct) factors, Chapter 75 would apply. It reserved judgment on which section should be used where the board does not sustain the misconduct charge or where an employee alleges bad faith in the agency's putting forth the misconduct charge in order to bring the action under Chapter 75.

A second exception was recognized where agencies and employees do not fall within Chapter 43 as provided in § 4301(1) and (2). Such performance-based cases could only be brought under Chapter 75.

It also identified two other possible exceptions: (1) cases charging insubordination even though involving an employee's refusal to perform his duties, although such actions could be brought under Chapter 43 if the agency relies solely on failure to meet performance standards; and (2) cases where there would be a substantial likelihood that delay in removal for the purpose of allowing time for improvement would result in injury, death, breach of security, or great monetary loss.

The MSPB then formulated standards for determining what actions are solely based on failure of performance. Since these "standards" will be referred to in our analysis, we quote them in their entirety (23 M.S.P.R. at 616-17):

> [T]he Board will presume that a performance-based Chapter 75 action effected after October 1, 1981, is void *ab initio* unless the agency shows, by preponderant evidence, that: (1) the action is based solely on misconduct rather than performance or, as noted above, on both; or (2) the action is excluded or excepted from the rule, as described in Part II; or (3) that the action should otherwise be excepted from the rule based on public policy or other considerations.
>
> In determining whether Chapter 75 actions are based on performance or misconduct, the Board will utilize two standards. First, the Board will presume, subject to agency rebuttal by preponderance (sic) evidence, that charges which directly relate to an appellant's critical or non-critical elements[18] or performance standards are performance-based, irrespective of whether the agency is able to frame the charges in terms of misconduct. Since many violations of performance standards can easily be characterized as misconduct, no purpose would be served by adopting a standard that attempts to distinguish performance and misconduct actions based solely on the agency's characterization of the charges.
>
> A second standard the Board will utilize to determine whether Chapter 75 actions are based on performance or misconduct may be stated as

> follows: The Board will also presume, subject to agency rebuttal by preponderant evidence, that charges which directly relate to the appellant's duties and responsibilities, or work-related tasks, functions, and objectives, as shown in the employee's position description or by other relevant evidence, are performance-based, and may not, therefore, be taken under § 7513. [Footnotes omitted.]

The MSPB acknowledged, in note 18 appended to the above quotation, that:

> One consequence of the Board's ruling in this decision and of the application of this standard is that agencies may not take any removal or demotion actions based on an employee's non-critical elements. Such performance-based actions are not available under Chapter 75 and are not included in § 4303 since § 4303 actions must be based on a failure to meet critical elements. 5 U.S.C. § 4303(b)(A)(ii). In such cases, however, if the agency were to reassign the employee, any such reassignment would not be appealable to the Board under Chapter 43. *See* 5 U.S.C. §§ 4302(a)(3), (b)(6); 4303(e).

Finally, the MSPB announced that its "new rule of law" would be given a partially prospective application. With respect to pending cases or actions taken within 30 days of its *Gende* decision, the MSPB proposed to allow the agency to elect to have the action reconsidered as a Chapter 43 action, in which event certain new evidence and arguments would be received. The agency would also be permitted to show that the action was not performance-based (e.g., that

the poor performance was willful) or that it fell within one of the exceptions which the MSPB recognized.

In its role as intervenor, the MSPB urges us to uphold *Gende* and to affirm that Chapter 43 is "the exclusive procedure for performance-based actions after October 1, 1981." 23 M.S.P.R. at 614.

IV.

We are faced here with the question, as framed by the MSPB and petitioner: Does Chapter 43 provide the exclusive procedures for perfomance-based actions by an agency?

V.

Interrelationship of Chapters 23, 43, 75, and 77

We begin with acknowledgement that deference is appropriately given to the MSPB's interpretation of the CSRA. Congress has vested the MSPB with substantial responsibility for enforcing the Act. Moreover, it has rendered a thorough and perceptive opinion in *Gende*. However, there can also be no question that *Gende* modifies *Wells* and departs from the analysis of *Turnage* and *Kochanny*, precedent of this court to which it must defer. Moreover, *Wells* generated a number of board decisions which the MSPB acknowledges were inconsistent. Because of these factors, particularly the MSPB's own change in its perception of the statute, deference is not due to the extent it would ordinarily be given had the MSPB maintained a consistent position over the years. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981); *Securities and Exchange Commission v. Sloan*, 436 U.S. 103,

117 (1978); and *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

In *Gende*, the laudable objective of the MSPB was to interpret the statute in a manner which would give effect to merit principles, an objective clearly intended by Congress. In order to tie merit principles to performance-based actions, the MSPB believed it was necessary to eliminate use of Chapter 75 totally in connection with performace-based actions against employees. Thus, the MSPB read into Chapter 75 a limitation which Congress expressed nowhere in the statute itself or in the legislative history. It is a limitation of sweeping proportions, given the judicial interpretations of the prior statute holding that Chapter 75 applied to performance-based actions and was not affected by the procedures of Chapter 43. If Congress intended such a major change, one would expect a clear statutory provision or at least a single specific statement by Congress to the effect that Chapter 75, henceforth, could not be used for performance-based adverse actions. *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 550 (1978). In § 7512(D) Congress took pains to prevent Chapter 75 from being extended to embrace the newly created actions for removal or reduction-in-grade based on "unacceptable performance" as defined in Chapter 43. To construe § 7512(D) as a provision which also eliminates prior coverage of Chapter 75 would require strong indications that Congress intended such an interpretation. *Securities and Exchange Commission v. Sloan*, 436 U.S. at 122. Yet, our scrutiny of the legislative history has been as unrevealing of such an expressed intent as that of the MSPB.

We are in complete agreement with the MSPB that Congress intended that merit principles must be adhered to

by agencies in all perfomance-based actions. However, it is not necessary to read the *Gende* limitation into the statute in order to accomplish that objective. As will be discussed below, a *literal reading of the statute* fully implements congressional intent in that respect. Thus, the basis for the MSPB's interpretation is fatally flawed. Congress itself designed a statutory framework which implements merit principles in connection with Chapter 75 actions. Regardless of the worthiness of its devised procedures, the MSPB is without authority to change the statutory design. *Heckler v.Turner*, 105 S.Ct. 1138, 1153 (1985); *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979); *Markham v. Cabell*, 326 U.S. 404, 410 (1945).

As a matter of initial impression, the procedural complexity which could be created by endorsement of the *Gende* decision appears in itself to violate the merit principles espoused by Congress. From the viewpoint of the public, the court would be approving a return to the technical complexities in disciplinary procedures which Congress characterized as "asphyxiating" of merit principles. The CSRA must be interpreted so as to give effect to Congress' expressed desire that the new statute serve the *public's interest* in seeing that employees who do not live up to the public trust can be efficiently removed and, at the same time, in requiring management to act for the right reasons.

The MSPB feared that agencies might attempt to use Chapter 75 in place of Chapter 43 to avoid the merit principles embodied in Chapter 43. However, in view of Chapter 77, Chapter 75 provides agencies with no escape route from merit principles. § 7701(c)(2)(B) provides that no adverse action may be sustained if the employee:

> shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title.

Under § 2302(b)(11) it is a prohibited personnel practices (sic) to violate the merit principles set out in § 2301(a). The following specific merit principles in § 2301(a) bear repeating here:

> (6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.
>
> (7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

It must be noted that these principles are not stated in the narrowly defined language of Chapter 43, that is, in terms of "unacceptable performance," but more broadly in terms of "inadequate performance." Thus, the statute, as written, ties an agency which elects to proceed under Chapter 75 to the same merit principles which are stated with more specificity, in some respects, more narrowly, in Chapter 43. Violation of merit principles has been made a specific defense to adverse actions under Chapter 75. Moreover, that defense is a substantive one, not merely procedural.

Providing employees with the *defense* of a prohibited personnel practice to a Chapter 75 action, rather than requiring an agency, as *Gende* holds, to show that it has chosen the right chapter under which to proceed, may not be the most favorable position for some employees. Nevertheless, a literal reading of the statute leads to this

statutory structure. Further, we are unpersuaded that we can depart from that literal reading simply on arguments that Chapter 43 is more protective of employees' rights. *See Heckler v. Turner*, 105 S.Ct. at 1153. The somewhat greater burden on the employee under Chapter 75 in this respect is balanced by the greater burden on the agency under Chapter 75. Importantly, from the viewpoint of the *public*, the time-consuming and expensive effort, by the MSPB and by this court, in resolving preliminary skirmishes is entirely eliminated. Once brought, a case can proceed to resolution on the merits — not delayed by technicalities. Further, the employee suffers no loss of the substantive rights given in Chapter 23.

These substantive rights are not and should not be inextricably intertwined with the Chapter 43 appraisal procedures.[11] The methods and criteria of performance evaluation are a developing science or art. A reading of Chapter 430 of the Federal Personnel Manual, which provides guidance to agencies, discloses that performance evaluation by pre-set standards is in its infancy of development. Some agencies no doubt are better at it than others — particularly in this early stage of implementation. Some systems are better than others. Some positions are extremely difficult to fit into a standards pattern at all, e.g., a research scientist. Exceptions may have to be permitted to coverage of such positions. Some agencies may detail many

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[11] *Accord, Hatcher v. Dept. of Air Force*, 705 F.2d 1309, 1313 (11th Cir. 1983):

> Holding as we do that Chapter 43 does not provide the exclusive procedure for performance related removals, it would be incongruous to read into the Chapter 75 procedure the distinguishing features of Chapter 43 "unacceptable performance" removal procedures.

critical elements in each position. Others few. Evaluation may be by one manager or several managers, with or without input by peer groups.

Agencies have been given great flexibility in the structure of appraisal systems in these respects in order to be able to experiment and develop a system or systems that meet their particular needs. They are encouraged by the Federal Personnel Manual to constantly review position standards and evaluation methods and to change as appropriate. (FPM at 430-A-6). As we are beginning to see in appeals of removals under Chapter 43, such review is necessary. The performance appraisal systems being utilized by agencies have not approached the level of perfection, either in defining performance standards or in the critical elements of individual positions or in evaluation techniques. Mistakes are made in setting criteria. Aspects of performance which are important to the job may not appear in the written statement of standards; others may be denominated "critical" which should not be. When such mistakes are made by the agency, the "easy" route of Chapter 43 must be denied. An employee sought to be removed under Chapter 43 is entitled to be rated on reasonable standards and to have the specific procedures of Chapter 43 applied in connection with those standards. This protection is the *quid pro quo* for the lesser burdens on the agency under that chapter. However, nothing in the statute or legislative history indicates that an employee should thereby be entitled to his position despite serious performance deficiencies where an agency can meet the heavy burdens of Chapter 75 and can show substantive compliance with merit principles.

The normal assumption, where Congress amends one part of a law leaving another part unchanged, is that "the

two were designed to function as parts of an integrated whole" and each should be given "as full a play as possible." *Markham v. Cabell*, 326 U.S. 404, 411 (1945). The CSRA left the substantive ground for removal "for cause" in Chapter 75 unchanged. It is elementary that repeals by implication are not favored and are permitted only to the extent of clear repugnancy. *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 456-57 (1945). Neither chapter in the statute before us is without function nor meaningless in light of the other. They function well as alternative procedures. The significant change affecting Chapter 75 cases is not found in Chapter 43, but rather in Chapters 23 and 77, under which violations of merit principles are made a *defense*. It would, for example, be inconsistent with the merit principles set out in § 2301(a)(6) and (7) for an agency to bring an action "for cause" under Chapter 75 based solely on performance that is governed by and meets the critical elements set forth for the employee's position. An agency may not circumvent Chapter 43 by charging that an employee should have performed better than the standards communicated to him in accordance with Chapter 43.

In view of the extraordinarily broad discretion of agencies in setting evaluation systems, the continued viability of removal "for cause" under Chapter 75 for performance-based reasons is appropriate, considering the government workforce as a whole. All federal employees should be subject to some degree to a uniform disciplinary system so that some employees are not able wholly to escape the consequences of poor performance for technical procedural reasons. As Congress recognized, "[t]he morale of even the best motivated employee is bound to suffer under such a system." Senate Report at 3, 1978 U.S. Code & Ad. News at 2725. Chapter 75 provides that all-

encompassing umbrella. To make Chapter 43 the exclusive remedy would make each agency a law unto itself.

We also see nothing in the statute to prevent the agency from bringing a mixed case, for example, relying on Chapter 43 for "unacceptable performance" in a critical element with an alternative, or additional charge, under Chapter 75 for "such cause as will promote the efficiency of the service." In such cases, the appropriate standard of review by MSPB should be applied according to the basis for each specific charge. Adjudicative bodies routinely deal with more than one standard in cases brought before them.

One further consideration in construing Chapter 75 to include performance-based cases is that agencies will continue to be able to discipline employees with lesser sactions for poor performance than removal or demotion, the only sanctions authorized in Chapter 43. If Congress intended to eliminate lesser penalties in all performance-related cases, again we would expect some indication to that effect by Congress.

Finally, subsequent action by Congress confirms our analysis of the scope of Chapter 75. As indicated, the *Gende* decision limits the "such cause" ground of § 7513(a) to "misconduct" and "malfeasance" in performance. However, it is apparent from a later amendment that Congress knows how to write that type of limitation into Chapter 75 when it wishes to do so. In connection with employees in the Senior Executive Service (SES) who are covered separately in Chapter 75 (§§ 7541-7543), the CSRA originally provided in § 7543(a) for action against an SES employee "only for such cause as will promote the efficiency of the service." In 1981, that section was specifically amended to provide for actions "only for misconduct, neglect of duty, or malfeasance." The latter

basis is, in essence, the limitation which the MSPB seeks to read into § 7513(a) by implication. As with § 7543(a), we conclude that a change in § 7513(a) to effect such limitation must be left to Congress.

Thus, while we are in substantial agreement with the MSPB that merit principles must be applied in all performance-based actions, we differ with respect to statutory procedures. We do not read Chapter 43 as implicitly *eliminating* removal or demotion actions for performance reasons under Chapter 75.

Returning to the present appeal, we reject the MSPB's request for remand of this case for reconsideration under Chapter 43. Chapter 75 remains available for performance-based adverse actions, and petitioner's case, therefore, was properly treated as a Chapter 75 removal case.

IV.

Merits

On the merits of his appeal, petitioner contends that his removal was improper in that:

(1) the agency failed to prove its charge of unsatisfactory performance;

(2) the removal was in reprisal for his "whistle-blowing" activities, i.e., his reporting of security violations;

(3) he was denied procedural due process by the MSPB;

(4) the agency committed harmful procedural error in effecting his removal; and

(5) the agency action was taken before OPM had rendered a decision on an agency-initiated disability retirement application, in violation of 5 C.F.R § 831.1206.

Proof of Charge

Petitioner contends that the agency failed to prove its charge of unsatisfactory performance by a preponderance of the evidence. In removal actions under Chapter 75, preponderance of evidence is the agency's burden of proof before the MSPB. 5 U.S.C. § 7701(c)(1)(B). *See* Part II D, *supra*. However, under 5 U.S.C. § 7703(c)(3), our review is under the substantial evidence standard, regardless of whether the action originates under Chapter 43 or Chapter 75.

The agency presented abundant documentary and testimonial evidence indicating that petitioner's work was deficient, including, *inter alia*, three written performance evaluations: a June 17, 1981 Performance Evaluation, an October 1, 1981 Performance Evaluation, and an August 25, 1981 "Joint Investigation Report." The latter evaluation is particularly significant as it was prepared jointly by a member of agency management *and* a member of petitioner's union, in accordance with the union agreement. It concludes that petitioner's work product was unsatisfactory, poorly organized and written, and difficult to understand. Though petitioner emphatically denies that his work was unsatisfactory, the evidence presented by the agency supporting such charge is overwhelming. In sum, the record clearly contains substantial evidence to suport the charge, i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Petitioner also argues that certain evidence considered by the agency and the board should have been disregarded since it concerns work performance occurring prior to one year preceding his proposed removal. Petitioner also faults

the agency for failing to introduce any evidence of "critical element " performance deficiencies. However, in accordance with our previous analysis, the agency action here was properly taken under Chapter 75,[12] and the procedural prerequisites of a Chapter 43 action referenced by petitioner are, thus, inapplicable.

Reprisal

Petitioner also argues that his removal was instituted in reprisal for his reporting of security violations. As petitioner acknowledges, it is extremely difficult to prove a case of retaliation. The presiding official fully considered the supporting testimony of Mr. Richard S. Day, Security Specialist, petitioner's only corroborating witness, but discounted such testimony based on Day's admission on cross-examination that he was unhappy with management (and, thus, appeared likely to biased in petitioner's favor) and on the observation that Day's testimony was at times "evasive and non-responsive." Determinations of credibility are within the exclusive province of the factfinder, and we will not attempt to second-guess the presiding official, who was present at the hearing and observed first-hand the demeanor of the witness. *Hagmeyer v. Department of the Treasury*, 757 F.2d 1281, 1284 (Fed.Cir. 1985).

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[12] We note, in particular, the notice of proposed removal whic explicitly states, "You are hereby notified of a proposed action to terminate your employment with NSWSES *for the efficiency of the service* . . . ." (Emphasis added.)

Discovery and Conduct of Hearing by MSPB

Petitioner alleges that the presiding offical improperly denied his request for subpoenas, admitted into the record evidence that was objected to and should have been excluded, and allowed the agency rebuttal testimony, while preventing petitioner from introducing surrebuttal evidence. We have carefully examined each assertion, but conclude that no legal error or abuse of discretion on the part of the presiding official has been established. 5 U.S.C. § 7703(c)(1).

Agency Procedural Error

Petitioner contends that the agency's removal action was defective procedurally in its timing. The sequence of events leading to this removal and its appeal are as follows:

Oct. 21, 1981:

Agency files disability retirement application with OPM and notified petitioner of such.

Oct. 29, 1981:

Agency issues notice of proposed removal to petitioner.

Nov. 30, 1981:

Removal of petitioner effected.

Dec. 10, 1981:

Petitoner appeals removal to MSPB.

Jan. 8, 1982:

Upon notification that OPM has approved disability retirement application, agency cancels removal and moves to dismiss petitioner's appeal.

Feb. 23, 1982:

Petitioner's appeal to MSPB dismissed as moot.

July 23, 1982:

Upon reconsideration requested by petitioner, OPM reverses its initial decision and disallows disability retirement application.

July 1, 1983:

Upon request for reconsideration by agency, OPM adheres to disallowance and issues final decision of such.

Sept. 2, 1983:

Agency notifies petitioner that, as a result of OPM's action, the removal action is reinstated retroactive to November 30, 1981.

Sept. 22, 1983:

Petitioner appeals to MSPB.

Petitioner contends that the retroactive reinstatement of the removal action was procedurally improper. The presiding official considered this argument but determined that the agency acted properly and in good faith, relying on the vacillating position of OPM, and that petitioner had suffered no harmful error as a result of the agency's action. We agree with the board that the agency took appropriate corrective action under the circumstances.

Removal During Pendency of Retirement Application

Petitioner, in his *reply brief* to this court, and at oral argument, attacks the removal and its retroactive reinstatement as a violation of 5 C.F.R. § 831.1206, which provides, in pertinent part, as follows:

> An agency shall retain an employee in an active duty status until it receives the initial decision of the Associate Director for Compensation on an agency application for disability retirement, except that the agency on the basis of medical evidence, may place an employee on leave with his/her consent, or without his/her consent when the circumstances are such that his/her retention in an active duty statuts may result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the employee, his/her fellow workers, or the general public.

Petitioner argues that the agency was obligated by this regulation to keep him on active duty status (or, presumably, on leave status, with or without his consent) until it had received at least the first determination by OPM on the disability retirement application.[13] Thus, per petitioner, the earliest date his removal could properly be effected was January 11, 1982.[14] If the removal was taken

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[13] Petitioner maintains that the agency was cognizant of this requirement as evidenced by the following statement contained in the agency's notification to him that it had initiated a disability retirement application:

> You will remain in an active duty status until an initial decision is received from the Associate Director for Compensation. During this period you may be placed in a leave status with or without your consent.

[14] The exact date involved, January 8 or January 11, is unclear from the record. Agency correspondence indicates that the removal was cancelled on January 8 by issuance of an SF-50. However, the notice from OPM to the agency appears to have a received date stamp of January 11, the date upon which petitioner relies. This matter is appropriate for resolution, if necessary, on remand.

precipitously, petitioner, of course, would be entitled to back pay from the effective date of his removal, November 30, 1981, to the date the agency received notice of OPM's approval of the disability retirement application, January 8 or 11, 1982. The propriety of the removal action itself, however, would be unaffected, since petitioner has demonstrated no harm (other than lost pay) resulting from the allegedly precipitous action.

The record before us does not indicate that this specific argument was raised below, so that it may properly be considered on appeal. *Haynes v. United States*, 418 F.2d 1380, 1382 (Ct. Cl. 1969). The regulation at issue was not addressed by the presiding official in his decision; however the government makes no assertion that the argument is untimely. In any event, we decline to consider the issue *de novo*, and, therefore, remand for appropriate action by the board in light of the above discussion.

Conclusion

The decision of the MSPB affirming petitioner's removal under Chapter 75 is *affirmed*. The case is *remanded* to the MSPB for a determination of whether petitioner may assert entitlement to pay under 5 C.F.R. § 831.1206 and the amount thereof.

AFFIRMED AND REMANDED

United States Court of Appeals for the Federal Circuit

ALBERT J. LOVSHIN,

Petitioner,

vs. Appeal No. 84-1002

DEPARTMENT OF NAVY,

Respondent.

SKELTON, *Senior Circuit Judge* (with whom KASHIWA, BENNET, *Circuit Judges*, MILLER,* *Senior Circuit Judge*, and NEWMAN, *Circuit Judge*, join), dissenting.

I respectfully dissent. This is a very important case in which the MSPB has intervened, and one that should not be lightly considered. The case is important because the majority opinion deprives government employees in the competitive service of certain rights granted to them by Congress in 1978 when it amended Title 5 § 4303 (Chapter 43) governing removal proceedings by an agency against employees for unacceptable performance. These rights include, among others, entitlement to 30 days' advance written notice of the proposed action which identifies specific instances of unacceptable performance on which the action is based and the critical elements of employee's position involved in each instance of unacceptable performance, representation by an attorney or other representative, a reasonable time to answer orally and in writing, a decision within 30 days after the expiration of the

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* Judge Miller assumed senior statuts effective June 6, 1985.

notice period specifying the instances of unacceptable performance on which the removal is based, freedom from removal proceedings for unacceptable performances occurring more that one year prior to the date of the 30-day notice, an opportunity to improve the employee's performance (*see* § 4302(b)(6)), and if improvement that is acceptable continues for one year from the date of the notice, all entries or notations of the removal proceedings shall be removed from his record, and, finally, freedom from removal on *ad hoc* rules and decisions of agencies, a practice Congress sought to eliminate by its amendment of § 4303 (Chapter 43).

These rights have been taken away from employees by the majority opinion in its holding that an agency may use Title 5 § 7512 (Chapter 75) proceedings to remove an employee for unacceptable performance instead of Chapter 43. Chapter 75 does not grant employees the above rights present in Chapter 43. As will be shown more fully below, this holding is contrary to, and violates, both Chapter 43 and Chapter 75. The decision also imposes an additional burden on agencies because in removal proceedings under Chapter 75 the agencies must prove the charges by the higher standard of preponderance of the evidence instead of the lesser standard of substantial evidence allowable under Chapter 43. *See* Title 5 § 7701(c)(1)(A) and (B). Accordingly, the majority opinion adversely affects both employees and agencies.

The majority opinion is in error when it holds that Chapter 75 (Title 5 § 7512) proceedings may be used in a performance-based action to remove an employee who is subject to removal under the provisions of Chapter 43 (Title 5 § 4303). This error is readily apparent to anyone who reads this statute, which provides as follows:

Title 5 § 4303 (Chapter 43):

§ 4303. Actions based on unacceptable performance.

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to —

(A) 30 days' advance written notice of the proposed action which identifies —

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance.

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which —

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee —

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is a preference eligible or is in the competitive service and who has been

reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title.

(f) This section does not apply to —

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title.

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

(As amended Pub.L. 95-454, Title II, § 203(a), Oct. 13, 1978, 92 Stat. 1133.)

Title 5, § 7512 (Chapter 75):

§ 7512. Actions covered

This subchapter applies to —

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but *does not apply to* —

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) *a reduction in grade or removal under section 4303 of this title,* or

(E) an action initiated under section 1206 or 7521 of this title.

Added Pub.L. 95-454, Title II, § 204(a), Oct. 13, 1978, 92 Stat. 1136. (Emph. Sup.)

Thus, it is clear that § 7512 (Chapter 75) states in plain, unambiguous, and unequivocal terms that it *does not apply* to a removal under § 4303 (Chapter 43). In fact, in the first part of the majority opinion it is stated that "subsection D of § 7512 makes Chapter 75 not applicable to Chapter 43." This is, of course, correct. The opinion also quotes correctly the legislative history of the two chapters as follows:

> The legislative history advises simply that Chapter 75 governs any action against an employee 'where the basis for the agency action is misconduct or any other cause besides *unacceptable performance.* Actions based on *unacceptable performance* are governed by chapter 43.' (Emphasis added.) Senate Report at 46, 1978 U.S. Code Cong. & Ad. News at 2768.

The majority opinion also states that:

> "The statute should be applied as written."

This is of course correct, but the majority opinion holds exactly opposite and contrary to the statute as written.

In view of the clear and specific mandates of the statute, as well as the above admissions and approvals of the majority as to their meaning, it is indeed astonishing that the majority concludes that, notwithstanding the prohibition in § 7512(D) (Chapter 75), proceedings under Chapter 75 *may be used* in Chapter 43 removal proceedings against an employee based on unacceptable performance. This conclusion is directly contrary to the statute, and no amount of circuitous reasoning, philosophical interpretation, discussion of previous and other legislation, nor the citation of prior cases that are no longer applicable, can change its unambiguous provisions.

Chapter 43 (§ 4303) governs actions to remove an employee for unacceptable performance, and Chapter 75 (§ 7512) provides specifically that it *does not apply* to a removal under § 4303. Yet, in the face of these provisions of the statute, and contrary to them, the majority holds:

> "Chapter 75 remains available for performance-based actions."

It is obvious that this holding violates both sections of the statute.

In view of the foregoing and the discussion which follows, it must be said that the majority opinion cannot be sustained on any theory because it is contrary to the statute and, therefore, erroneous as a matter of law.

In the instant case Petitioner, Albert J. Lovshin, appeals from a decision of the Merit Systems Protection Board (MSPB or Board), Docket No. SF07528311046, approving the action of the Department of the Navy in separating him from his position at the Naval Ship Weapons Systems

Engineering Station, Port Hueneme, California, for inefficiency and poor workmanship.

BACKGROUND

Petitioner was an Electronics Engineer, GS-855-12, at the above Naval Station, when on October 23, 1981, the Navy submitted to the Office of Personnel Management (OPM) an agency-initiated application for his disability retirement. Thereafter, on October 29, 1981, the Navy sent Petitioner a Notice of Proposed termination stating that the Navy intended to discharge him, effective November 30, 1981, for unsatisfactory performance of his assigned duties. Following this notice, Petitioner was separated from the service on November 30, 1981, before OPM acted on the disability application. Petitioner appealed the discharge to the Board on December 10, 1981. Thereafter, on January 6, 1982, OPM notified the Navy that it had approved the disability retirement. The Navy then placed Petitioner on disability retirement status, retroactive to November 30, 1981. The Navy then filed a motion with the Board to dismiss Petitioner's separation appeal, which was granted by the Board on February 23, 1982.

The Petitioner filed a motion with OPM for reconsideration of the agency-initiated application for disability retirement, and on July 23, 1982, OPM granted Petitioner's motion and reversed its previous decision by denying the disability retirement application. This denial was upheld by OPM on July 1, 1983, after the Navy asked for a further reconsideration. Whereupon, the Navy retroactively reinstated its original discharge of Petitioner for inefficiency, effective November 30, 1981.

The Petitioner then pursued his discharge appeal. A hearing was held and the presiding official of the Board held that the charges were proved by the Navy by a preponderance of the evidence, that the reinstatement of the November 30, 1981, separation-inefficiency action by the Navy was proper, and that Petitioner's separation was for such cause as will promote the efficiency of the service. The decision of the presiding official was approved by the Board. The Petitioner has appealed from that decision to this court.

The Petitioner was removed and separated from his position by proceedings conducted under the provisions of Chapter 75 of the Civil Service Reform Act of 1978, Pub.L. 95-454, 92 Stat. 1121, 5 U.S.C. § 7513 (the Act). Petitioner contends that if he was to be removed for poor performance, the proceedings had to be conducted by the Navy under and in accordance with Chapter 43 (5 U.S.C. § 4303) of the Act instead of Chapter 75. The Navy argues that it had an option to file the action on the performance-based charge under either Chapter 75 or Chapter 43. This is the main issue in the case.

As a preliminary matter, it should be pointed out that when Congress passed the Act it provided in § 4302[1] that each agency should develop one or more performance appraisal systems to be approved by OPM by October 1, 1981. As events transpired many agencies failed to have such performance appraisal systems approved by OPM by said date. As a consequence, OPM issued interim regulations for the discharge of employees on performance-based charges under Chapter 43 of the Act. However, the

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[1] The Sections of the Act referred to herein are those found in Title 5, U.S.C.

Board held these regulations invalid in *Wells v. Harris*, 1 MSPB 199 (1979). The Board held further in that case that agencies could nevertheless maintain performance-based actions against employees under Chapter 75. A number of courts followed the *Wells* opinion in this regard and upheld the discharge of employees in such actions under Chapter 75 during the interim period before the agencies had an OPM-approved performance appraisal system in place. Some of these cases are *Kochanny v. Bureau of Alcohol, Tobacco & Firearms*, 694 F.2d 698 (Fed. Cir. 1982); *Turnage v. U.S.*, 230 Ct. Cl. 799 (1982); *Hatcher v. Department of the Air Force*, 705 F.2d 1309, *rehearing denied*, 712 F.2d 1419 (11th Cir. 1983); *Debose v. Department of Agriculture*, 700 F.2d 1262 (9th Cir. 1982); *Darby v. Internal Revenue Service*, 672 F.2d 192 (D.C. Cir. 1982); *Drew v. Department of the Navy*, 672 F.2d 197 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1072, 103 S.Ct. 493, 74 L.Ed.2d 634 (1983).

In *Wells*, the Board, at pages 235-236, reasoned:

> However, if a determination of inadequate performance is not made under a performance appraisal system provided for in Chapter 43, than it may be processed as a Chapter 75 action.
>
> Whichever action an agency chooses to pursue, it will have to comply with the procedural requirements of that Chapter. If an agency sees some advantage in pursuing [a] performance-based action under Chapter 75, it is not inconsistent with the Act so long as the agency meets the higher burden of proof — and the more difficult standard of demonstrating that the action will promote "efficiency of the service."

The following cases are in accord:

Kochanny, 694 F.2d at 701, *Hatcher*, 705 F.2d at 1312; *Debose*, 700 F.2d at 1266; *Darby*, 692 F.2d at 196; *Drew*, 672 F.2d at 201.

> In *Turnage*, the Court of Claims, at page 800, stated:
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> For presesnt purposes, it is sufficient to state that the act established two different, mutually exclusive procedural routes for disciplining employees on the basis of unsatisfactory job performance. 5 U.S.C.§ 752(d) (Supp. IV 1980)
>
> . . . Chapter 43 gives employees slightly more procedural protections, 5 U.S.C. § 4303 than does Chapter 75, 5 U.S.C. § 7513, but Chapter 43 actions are reviewed by the Board on a "substantial evidence" standard, while Chapter 75 actions must be supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1). As a result, Chapter 43 removals are more easily sustained, as Congress intended.

The basis for the decision in the above cases was the holding of the Board in the *Wells* case that an agency could proceed under either Chapter 75 or Chapter 43 in a performance-based action to remove an employee. However, on October 22, 1984, the Board in a well-reasoned and comprehensive opinion held in *Glende v. Department of Justice*, 23 M.S.P.R. 604 (1984), that after October 1, 1981, the exclusive procedure for bringing performance-based actions for the removal of an employee was Chapter 43 (§ 4303) and that after that date such such (sic) an action could not be brought under Chapter 75 (§ 7513), subject to certain exceptions.[2] I agree with this decision of the Board

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[2] We do not need to consider the exceptions discussed by the Board in

for reasons that follow. The cases discussed above are not applicable to the case before us for at least three reasons. In the first place, the charges filed in those cases were agency actions initiated or begun *before* October 1, 1981, the required OPM approval date for agency performance appraisal systems, whereas, in *Gende* and in our case the actions were begun *after* October 1, 1981. In the second place, those cases followed the decision of the Board in *Wells* and, for all practical purposes, were limited to performance-based actions filed during the interim period before October 1, 1981. Finally, the Board modified *Wells* and held for the first time in *Gende* that such actions filed after October 1, 1981, must be filed under Chapter 43 and could not be filed under Chapter 75 unless they involved one of the exceptions mentioned by the Board in that case. This in banc court should hold that *Kochanny, Turnage* and similar cases cited above are no longer applicable to performance-based actions against employees filed after October 1, 1981.

A study of the legislative history of the Act clearly indicates that Congress intended that performance-based removal and demotion actions be effected exclusively under Chapter 43 procedures. One of the main purposes of the Act was to simplify and expedite procedures against employees whose work and performance was substandard. *See* S. Rep. No. 95-969, 95th Cong., 2d Sess. 2 (1978), *reprinted in* House Comm. on Post Office and Civil Service, 96th Cong. 1st Sess., *Legislative History of the Civil Service Reform Act of 1978*, at 1466 (Comm. Print No. 96-2, 1979) (herein referred to as *Legislative History).* In amending

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Gende, as they are not involved in the case before us. Such exceptions will have to be decided on a case by case basis as they arise.

Chapter 43, Congress conferred certain benefits on both employees and agencies. Employees could no longer be removed or demoted under *ad hoc* rules of agencies. Any removal against them had to be based on the results of § 4302 appraisal systems. Furthermore, that Section and § 4303 provide that any employee whose reduction or removal is proposed must be given 30 days' notice which identifies the instances of unacceptable performance complained of, a reasonable time to reply, and an opportunity for improvement. These provisions indicate that Chapter 43 was intended by Congress to be the exclusive remedy to remove an employee for unacceptable performance. This conclusion is strengthened by the following statement on page 39 of the *Senate Report:*

> The purpose of section 203 is to provide for new systems of appraising employee work performance. The principal changes it makes in Chapter 43 or title 5, United States Code are the following:
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> — Abolishment of present requirements of summary adjective ratings and appeals for performance ratings;
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> — Establishment of revised performance appraisal system to be used as a basis for developing, rewarding, reassigning, demoting, promoting, retaining, and removing employees; and
>
> — Establishment of new procedures for taking action based on unacceptable performance.

The benefit conferred on agencies by the Act was the provision that they would be required to prove their charges against employees by the lesser standard of substantial evidence instead of the more exacting standard of preponderance of the evidence. 5 U.S.C. § 7701(c)(1)

provides that "in the case of an action based on *unacceptable performance* described in section 4303 of this title" the agency action shall be sustained only if "supported by substantial evidence" and shall be sustained "in any other case" if supported by a "preponderance of the evidence."

Also, as stated above, § 7512(D), which is a part of Chapter 75, provides that it does not apply to "a reduction in grade or removal under Section 4303 [Chapter 43] of this title." *See Schwartz v. Dept. of Transportation*, 714 F.2d 1581, 1583 n. 5 (Fed. Cir. 1983), which holds:

> [T]he provisions of Chapter 75 are inapplicable to reductions in grade or removals for unacceptable performance under 5 U.S.C. § 4303. *See* 5 U.S.C. § 7512(D) (1982).

This holding of our court is squarely on the issue involved in the instant case. The decision in that case is a precedent that is binding on us with respect to any decision we make on the same issue. However, the majority opinion does not follow it, does not even mention it, and holds directly contrary to it. This failure of the majority opinion to follow a prior decision of this court is unprecedented and contrary to the procedures and practices of this court. The majority opinion makes no attempt to overrule the *Schwartz* decision, and it could hardly do so, because *Schwartz* holds exactly what the statute says.

The above provisions of the statute, plus the legislative history of the Act, are convincing proof of the intention of Congress to make Chapter 43 the exclusive procedure in performance-based cases.

The MSPB has intervened in this case and urges us to uphold its decision in *Gende* and to hold that Chapter 43 is the exclusive procedure for performance-based actions filed

after October 1, 1981. The Board also requests that the instant case be remanded to it for further consideration. The majority opinion acknowledges the fact that the Board has intervened and notes its requests, but fails to give them any favorable consideration. The MSPB is an important part of our government and has considerable expertise in this area. It is trying to conscientiously administer Chapter 75 and 43 as written and as intended by Congress and is to be commended for these efforts. This court should give deference to its opinion and its application of the statute and allow it to reconsider the instant case in light of its decision in *Gende*. This is especially true in view of the fact that there are a number of other cases pending before the Board that involve the same Chapter 43 and Chapter 75 issue that is involved here.

I would hold that Chapter 43 is the exclusive procedure for agency performance-based actions against employees filed after October 1, 1981, and that Chapter 75 cannot be used in such cases. Also, I would vacate the decision below and grant the request of the Board and remand the case to it for reconsideration consistent with this opinion.[3]

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[3] I do not reach the merits, because no decision thereon can be made until the issue of the proper appalication of Chapter 43 and Chapter 75 has been resolved.

United States Court of Appeals for the Federal Circuit

ALBERT J. LOVSHIN,

Petitioner,

vs. Appeal No. 84-1002

DEPARTMENT OF THE NAVY,

Respondent.

NEWMAN, *Circuit Judge* (with whom KASHIWA, BENNETT, *Circuit Judges*, and MILLER,* *Senior Circuit Judge*, join), dissenting.

I respectfully dissent from the court's decision, and for the reason given I write separately.

This decision turns solely on determination of the intent of Congress. Did Congress intend, when it stated:

> Actions based on unacceptable performance are governed by Chapter 43 . . .[1]

to mean that actions based on unacceptable performance are governed by either Chapter 43 or Chapter 75, at the option of the agency?

The Civil Service Reform Act of 1978 included implementing amendments to both Chapter 43 and Chapter 75:

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* Judge Miller assumed senior status effective June 6, 1985.

[1] S. Rep. No. 969, 95th Cong., 2d Sess. 46, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2768.

> § 4303(a): Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.
>
> § 7512(D): [Chapter 75] does not apply to . . . a reduction in grade or removal under [Chapter 43].

Ignoring this mandate, the court has concluded that clearer statutory language could have been used, and therefore that § 7512 must be ignored, and Chapter 75 remains inviolate. I cannot agree.

The asserted lack of clarity in the statutory language has only appeared in retrospect. The straightforward intention of the 1978 Act was blighted by delays in implementation of the performance standards required by Chapter 43 and by the appearance of loopholes, uncertainties, and gaps between the scopes of Chapters 43 and 75. The MSPB undertook to solve these problems, first by *Wells v. Harris*, 1 MSPB 199 (1979), which delayed the switch from Chapter 75 to Chapter 43 procedures until performance standards were in place, and then by *Gende v. Department of Justice*, 23 M.S.P.R. 604 (1984).

I agree with the analysis and conclusion of Judge Skelton's dissenting opinion, that this case must be remanded because Chapter 43 is the exclusive procedure for performance-based actions. That analysis is logical, it is simple, and it comports with the text of the Act and with the legislative history, which states:

> [N]o employee will be disciplined when performance standards and critical elements have not been adequately defined by an agency.

H.R. Rep. No. 1403, 95th Cong., 2d Sess. 21 (1978). In this I agree also with the analysis in *Gende* of the purposes and interpretation of the 1978 Act.

I write separately to emphasize my concern about the prospective "interstitial legislation" — to quote from the MSPB's brief in this appeal — that is set forth in *Gende*. That portion of *Gende* relates to issues not before the MSPB or this court, is of the nature of dicta, and presents issues that are not ripe for adjudication.

Changes in law and practice contrary to clear congressional intent, even when necessary to remedy perceived problems in the statutory scheme, require the attention of Congress and not that of the executive branch or the judiciary.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

DECISION NO. SF07528311046

DATE: January 20, 1984

ALBERT J. LOVSHIN

vs.

DEPARTMENT OF THE NAVY

INTRODUCTION

By petition filed on September 22, 1983, the appellant, Albert J. Lovshin, appealed the action of the Department of the Navy, Naval Ship Weapons Systems Engineering Station, Port Hueneme, California, which retroactively reinstated the appellant's separation for inefficiency, effective November 30, 1981. The appellant held the position of Electronics Engineer, GS-12, Step 3.

BACKGROUND

On October 29, 1981, the agency issued the appellant a Notice of Proposed Termination of Employment based upon the unsatisfactory performance of his assigned duties. The Notice of Final Decision, dated November 13, 1981 informed the appellant that he would be removed from employment effective November 30, 1981 for the reasons set forth in the proposed notice.

The agency had previously directed the appellant to undergo a medical fitness-for-duty examination. Based upon the results of the psychiatric evaluations of the appellant, the agency, on October 23, 1981, submitted an agency-initiated application for disability retirement on behalf of the appellant to the Office of Personnel Management (OPM).

On December 10, 1981, the appellant filed a petition with the Board appealing the November 30, 1981 separation action. On January 8, 1982, the agency filed a motion to dismiss the appellant's petition of appeal because the agency-initiated application for disability retirement had been approved by OPM. Thereupon, the agency cancelled the SF-50, which documented the appellant's separation for inefficiency, substituted a new SF-50, Retirement-Disability, effective November 30, 1981. Subsequently, OPM notified the agency that the appellant did not request reconsideration of its initial decision within the required time limitation.

On February 23, 1982, the Board's San Francisco Regional Office dismissed the appellant's petition of appeal since the cancellation of the removal action had rendered the appeal moot.

Subsequently, on July 23, 1982, OPM notified the agency that the appellant had, in fact, filed a request for reconsideration and submitted additional medical and psychiatric evaluations in support of his position. Based upon a review of the entire medical record, including the newly submitted information, OPM reversed its initial decision, and disallowed the agency-filed disability retirement application. The agency was granted the right to request reconsideration of the decision disallowing the application. On August 20, 1982, the agency protested the

actions taken by OPM and submitted further arguments in support of its position.

OPM issued its final decision on September 17, 1982, sustaining its reconsideration decision which disapproved the agency-initiated application for disability retirement on behalf of the appellant. OPM apologized for any confusion or inconvenience that it may have caused by its improper handling in this matter.

On September 2, 1983, the agency informed the appellant that due to the decision of OPM, the SF-50, Retirement-Disability, was cancelled, and the SF-50, Separation-Inefficiency, was reinstated retroactively, effective November 30, 1981. The appellant was also informed of his appeal rights to the Board from this action.

LAW, ANALYSIS, AND FINDINGS

The appellant was removed from his position for unsatisfactory performance. Title 5, U.S.C. Section 4303(a) and 5 C.F.R. 432.203(a) provide that an agency may remove an employee who continues to have unacceptable performance, but only after an opportunity to demonstrate acceptable perfoormance, in one or more of the *critical elements* of his position. The agency first must establish a performance appraisal system, with critical elements and identification of performance standards, which has been approved by the Office of Personnel Management. If this has been accomplished, then in order for the agency to prevail in a removal action based upon unsatisfactory performance, it must be able to prove the charges by *the substantial evidence test*. 5 U.S.C. Section 7701 (c)(1)(A). If, as in this case, the agency has not secured the approval of OPM of its performance appraisal system, then it may

remove an employee for unsatisfactory performance or inefficiency under Subpart D of Part 752, Title 5, C.F.R.[1] Accordingly, in this appeal, the agency must be able to prove the charges by the preponderance of the evidence test. 5 U.S.C. Section 7701 (c)(1)(B). See *Wells v. Harris*, 1 MSPB 199 (1979).

The issue presented in this appeal is whether the agency has met its burden of proving the charge of unsatisfactory performance by the preponderance of the evidence of record. The burden is on the agency to produce sufficient evidence to the Board to substantiate the appellant's alleged deficiencies. *Danko v. Department of Defense*, 5 MSPB 35 (1981).

On October 29, 1981, the agency issued the appellant a Notice of Proposed Termination, based upon unsatisfactory performance ratings issued to the appellant on June 17, 1981 and October 1, 1981. The ratings covered the period from approximately June 1980 through October 1981. The appellant declined to submit any specific reply to the charges either personally or in writing. On November 13, 1981, the agency issued its final decision which found that

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[1] Section 432.205. Interim procedures.

(a) An agency may taken an action under this part only after:

(1) Approval by the Office of Personnel Management of a performance appraisal system plan covering the employee;

(2)Establishment of critical elements and identification of performance standards under 5 C.F.R. Section 430.205 for all employees within the work group who are performing similar work; and

(3) Compliance with the requirements of this part; or

(b) Prior to the completion of an approved system plan and the development of critical elements and standards, an agency may reduce in grade or remove an employee for unsatisfactory performance or inefficiency under Subpart D of Part 752 of this Title. [45 FR 13431. Feb. 29, 1980].

the charge of unsatisfactory performance was supported by the evidence and warranted removal.

The agency's adverse action file contains all of the notice letters, a copy of the appellant's Position Description, copies of the various performance appraisals relied on to support the charges, a copy of appellant's written reply, and a pre-action investigation report submitted by T.H. Frye, Jr., dated October 27, 1981. Also included were copies of all correspondence, documents, SF-50's, related to the initial separation-inefficiency of the appellant, the cancellation and substitution of the separation-disability retirement, the cancellation of that action and the reinstatement of the separation-inefficiency, effective November 30, 1981.

During the hearing, the appellant testified that he had received a copy of the Performance Standards and he agreed that the Performance Standards were attainable. He stated that he could and did satisfactorily perform all of his assigned duties and that he was qualified to function as a Project Engineer, as he had both the experience and educational background and training. He maintained that his performance was satisfactory at all times, both prior to and after coming under the supervision of Stanley Garrow and Elman Bergum.

Mr. Garrow, appellant's first-line supervisor, and the proposing official, and Mr. Bergum, the appellant's second-line supervisor, and the deciding official, both testified at length under direct and cross-examination concerning the appellant's professional performance. They stated that the appellant's performance evaluation covered the period from approximately June 1980 through October 1981 and that it was their professional opinion based upon their observation of the appellant's work habits and a review of his work product that his performance was below an acceptable level.

They informed the appellant that his performance was unsatisfactory in January of 1981, pointing out the areas of his deficiencies, and offering him advice and guidance in order to bring his performance up to an acceptable level.

Both Mr. Garrow and Mr. Bergum explained that all of the project engineers at the agency have to work on a team effort, and that all of their work was interrelated with the work projects of other engineers. They found the appellant to be non-communicative and not a team worker. The appellant had approximately five or six project assignments during this period of time and he either did not complete the assignment or his work product was unacceptable and could not be used. The appellant refused to hear offers of guidance or assistance and he would not inform them on how his projects were proceeding or if he had encountered any problems. Both Mr. Bergum and Mr. Garrow stated that they had received complaints about the appellant's professional performance, as well as his personal conduct, from other supervisors to whom the appellant had been detailed. Some of the other department heads would not accept the assignment of the appellant to any of their projects because of his performance and work habits. They also reported some of the appellant's co-workers had complained about the appellant's actions and conduct on the job which they found to be disruptive and unwelcomed.

Thomas H. Frye, Engineering Department Manager, testified during the hearing that he was assigned to conduct an investigation of the facts and circumstances which led to the unsatisfactory performance rating of the appellant. He stated that he did not know the appellant and that the appellant had never worked under his supervision. He explained that he did not make a professional evaluation of the appellant's performance or work product. The purpose

of his investigation was to ensure that all of the procedural requirements were met. Mr. Frye testified that he submitted the results of his investigation in a memorandum report dated October 27, 1981 (Agency File-P). In his report, he stated that he interviewed three other supervisors who had first-hand knowledge of the appellant's work and they all had concluded that the appellant's performance was unsatisfactory. Mr. Frye also testified that he investigated the appellant's allegation that the removal action was taken in reprisal or retaliation for his reporting numerous security violations. He found no evidence to support the allegation.

During the hearing, the agency introduced a report of a Joint Investigation, dated August 25, 1981, and signed by V.S. Arvis, Federal Union of Scientists and Engineers, and by M.E. Ables, Management Representative (Agency Hearing Exhibit-S). Mr. Arvis testified during the hearing that this investigative report was done by two qualified engineers, one picked by the union, and the other picked by management. The purpose of this report was to submit an objective evaluation of the appellant's work product, in accordance with the union agreement. The investigation was conducted as the result of a grievance filed by the appellant from an unsatisfactory performance rating. Their consensus findings were that the appellant's submissions were unsatisfactory, poorly organized and written, and difficult to understand. The product was not characteristic of what is expected of a GS-12 Electronic Engineer and the work appears at best to be that of a GS-5 or a GS-7 level quality.

In his testimony, appellant denied that his performance was unsatisfactory or that he failed to complete his assignments. However, the main thrust of his appeal was that Mr. Garrow and Mr. Bergum had removed him in reprisal and

in retaliation for his having filed numerous reports with the Security Manager of alleged security violations by his co-workers and his supervisors.

A great deal of testimony was provided by various witnesses concerning the appellant's preoccupation with security and his perception of what amounted to security violations and mishandling of classified information. His supervisors testified that appellant spent an unusual amount of time looking for security violations, all of which were either negligible or inadvertent, and reporting these to the Security Manager. This created an atmosphere of distrust and frustration on the part of his co-workers.

The appellant testified that all security violations are serious and must be reported. He acknowledged that he made no attempt to personally correct or secure any classified documents and adamantly stated that they should be reported and corrected by the security personnel.

Richard S. Day, Security Specialist, testified that the appellant had reported to him on numerous occasions security violations on the part of his co-workers and supervisor. It was his opinion that any security violation was serious, must be reported, and must be corrected. He personally felt that the appellant should have been commended for his action, rather than criticized. He further felt that the appellant was removed from his position because of his numerous reports of security violations, not because of his professional performance.

Under cross-examination, Mr. Day admitted that he had been reassigned from his position because of his disagreement with management over security management policy and that he was unhappy with the treatment that he had received. He further stated that he was resigning from his position very shortly in order to accept an overseas

assignment. It was the agency's position that Mr. Day was a disgruntled employee and his credibility was questionable. Further, Mr. Day admitted that neither of the appellant's immediate supervisors were ever officially reprimanded for security violations.

I find no rational basis to conclude that the removal of the appellant from his position was in retaliation or reprisal for filing reports of security violations. Mr. Day's testimony was at times evasive and non-responsive. Further, he had no professional qualifications in order to evaluate the appellant s performance.

I find the charge of unsatisfactory performance is sustained by the overwhelming evidence. The testimonies of Mr. Garrow and Mr. Gergum concerning the appellant's substandard performance and conduct was convincing and definitive. Their evaluation of his performance was supported by the inquiry conducted by Mr. Frye, who reported that three other supervisors found appellant's performance to be unsatisfactory. Also, the Agency's Hearing Exhibit S, conducted by two independent and objective professionals found the appellant's work product to be unsatisfactory and at the level of a GS-5 or a GS-7.

I further find that the retroactive reinstatement of the November 30, 1981 Separation-Inefficiency Action was proper and in accordance withthe regulations. Good personnel practice dictates that an agency must file an agency-initiated appalication for disability retirement on behalf of an employee under the circumstances present in this case. 5 C.F.R. Section 831.1203. Title 5 U.S.C. Section 8347(a) provides that the Office of Personnel Management shall administer the Civil Service Retirement Law. The agency complied with the decision of OPM, which first allowed the disability retirement and then disallowed it. The

agency had no alternative but to take the corrective action directed by OPM. The agency acted in good faith and for the sole benefit of the appellant. He suffered no harmful error as a result of the agency's actions. The agency should not be held responsible for the errors committed by OPM and their handling of the appellant's request for reconsideration. The appellant did not officially serve notice on the agency that he had requested reconsideration of OPM initial decision approving the agency-initiated application for disability retirement. In summation, I find that the charge of unsatisfactory performance was sustained by the preponderance of the evidence. The Separation-Inefficiency Action was for such cause as will promote the efficiency of the service. *Siegelman v. Department of Housing and Urban Development*, MSPB Docket No. DC0432810293 (January 10, 1983).

DECISION

The Separation-Inefficiency Action is AFFIRMED.

APPEAL RIGHTS

This is an initial decision of the Merit Systems Protection Board. Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing an original and one copy of a petition for review with the Secretary, Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419, in accordance with 5 C.F.R. Sections 1201.114 and .115. The petition for review must be filed on or before February 24, 1984 and must set forth objections to the initial decision, supported by references to applicable laws, regulations, and the record.

The initial decision will become a final decision of the Board on February 24, 1984 unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. Sections 1201.113 and .117.

Any appellant adversely affected or aggrieved by a final decision of the Board may obtain *judicial* review of that decision by filing a petition with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439.

Such a petition may not be filed as long as the case is pending before the Board. To be timely, the petition must be *received* by the Court within 30 days of the final Board decision. 5 U.S.C. Section 7703(b)(1).

FOR THE BOARD:

THOMAS J. MANGAN
PRESIDING OFFICIAL

CERTIFICATE OF SERVICE

I certify that on the below listed date I sent by regular mail franked, prepaid postage, a copy of the Decision in this case addressed to the following:

Albert J. Lovshin
1800 Alturas Street
Oxnard, CA 93030

Douglas Stenzel
Stenzel, A Professional Corp.
3585 Telegraph Road, Suite F
Ventura, CA 93003

Cary P. Bell
Department of the Navy
Naval Ship Weapon Systems
Engineering Station
Port Hueneme, CA 93043

Office of the Chief of Naval
Operations
Department of the Navy
Washington, D.C. 20350

Date: January 20, 1984

Carol Freeland

APPENDIX C

United States Court of Appeals
for the Federal Circuit

No. 84-1002
DOCKET NO. SFO7528311046

ALBERT J. LOVSHIN,

Petitioner

v.

DEPARTMENT OF THE NAVY,

Respondent.

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: Removal under Chapter 75 is AFFIRMED.

REMANDED for determination of whether petitioner may assert entitlement to pay under 5 C.F.R. Sec. 831.1206 and the amount thereof.

DATED: June 21, 1985

ENTERED BY ORDER OF THE COURT

George E. Hutchinson, Clerk

_____

Clerk

ISSUED AS A MANDATE: AUG 2 1985

COSTS: Against, Petitioner

PRINTING - - - $274.08

TOTAL - - - - $274.08

APPENDIX D

Chapter 43

Section 4301. Definitions

For the purpose of this subchapter —

(1) "agency" means —

(A) An Executive agency;

(B) the Administrative Office of the United States Courts and

(C) the Government Printing Office;

but does not include —

(i) a Government corporation;

(ii) the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, or any Executive agency or unit thereof which is designated by the President and the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the General Accounting Office;

(2) "employee" means an individual employed in or under an agency, but does not include —

(A) an employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

(B) an individual in the Foreign Service of the United States;

(C) a physician, dentist, nurse, or other employee in the Department of Medicine and Surgery Veterans' Administration whose pay is fixed under chapter 73 of title 38;

(D) an administrative law judge appointed under section 3105 of this title;

(E) an individual in the Senior Executive Service;

(F) an individual appointed by the President; or

(G) an individual occupying a position not in the competitive service excluded from coverage of this subchapter by regulations of the Office of Personnel Management; and

(3) "unacceptable performance" means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.

Section 4302. Establishment of Performance Appraisal Systems.

(a) Each agency shall develop one or more performance systems which —

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for —

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal period, and thereafter at the beginning of each following appraisal period,

communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

Section 4303. Actions based on unacceptable performance

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice of the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and,

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance.

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee—

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is a preference eligible or is in the competitive service and who has been reduced in grade or

removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title.

(f) This section does not apply to—

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title.

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) The reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

(As amended Pub. L. 95-454, Title II, § 203(a), Oct. 13, 1978, 92 Stat. 1133.)

APPENDIX E

Chapter 75.

Section 7512. Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to —

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1206 or 7521 of this title.

Added Pub. L. 95-454, Title II, § 204 (a), Oct. 13, 1978, 92 Stat. 1136.

Section 7513. Cause and Procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to —

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

Added Pub. L. 95-454, Title II, § 204 (a), October 13, 1978, 92 Stat. 1136.

APPENDIX F

Chapter 23

§ 2301 Merit Systems Principles

(a) This section shall apply to-

(1) an Executive agency;

(2) the Administrative Office of the United States Courts; and

(3) The Government Printing Office.

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be-

(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences-

(A) A violation of any law, rule or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) In administering the provisions of this chapter [5 USCS §§ 2301 *et. seq.*]-

(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title [5 USCS, § 2302(a)(2)(C)]), the President shall, pursuant to the authority otherwise available under this title [5 USCS § 101 *et seq.*], take any action, including the issuance of rules, regulations, or directives; which is consistent with the provisions of this title [5 USCS § 101, *et seq.*] and which the President or the head, as the case may be, determines is necessary to ensure

that personnel management is based on and embodies the merit system principles.

(Added Oct. 13, 1978, P.L. 95-454, Title I, § 101(a), 92 Stat. 1113.)

APPENDIX G

Chapter 77. (In pertinent part)

Section 7701. Appellate Procedures.

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title [5 USCS § 3105], or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303 of this title [5 USCS § 4303] is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment-

(A) shows harmful error in the application of the agency's procedures in arriving at such a decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2303(b) of this title [5 USCS § 2302(b)]; or

(C) shows that the decision was not in accordance with law.

(Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 530; Oct. 13, 1978, P.L. 95-454, Title II, § 205, 92 Stat. 1138.)

APPENDIX H

5 C.F.R. § 831.1206 Duty status.

An agency shall retain an employee in an active duty status until it receives the initial decision of the Associate Director for Compensation on an agency application for disability retirement, except that the agency on the basis of medical evidence, may place an employee on leave with his/her consent, or without his/her consent when the circumstances are such that his/her retention in an active duty status may result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the employee, his/her fellow workers, or the general public. If the leave account of the employee is or becomes exhausted, any suspension or involuntary leave without pay shall be effected in accordance with applicable laws, Executive orders, and regulations.

[45 FR 23633, Apr. 8, 1980]

APPENDIX I

A. We were in a transition period at that particular time where the new performance appraisal system was just going into effect. It was the first time in my career where performance standards were actually being set for particular jobs and we — that was implemented. It started on the 1st of October in 1981. We set — "we", the station, set various policies regarding performance standards and supervisors and management was involved in implementing, making sure that standards were set for all of the jobs and I think that we went through a period of about 90 days from around the 1st of October until around the 1st of December to make sure that all these were set, that they were being implemented, and that all the procedural requirements were involved.

Q. Is this what's commonly known as BPAP that you were implementing?

A. It's known as BPAP; yes.

Q. Okay. So there was an interim period between the 1st of October, the 1st of January?

A. Yes.

Q. And what was the procedure to be followed in effecting the personnel actions during that period of time?

A. All of the within-grade increases which were affected by the standards of performance or the performance ratings were being held up on this 90-day interim period. The policy was that all performance ratings were given as of the 30th of September and that we would then go into the new BPAP system on the 1st of October and we would have to operate under that system for 90 days before any ratings could be given, so we went through a period of about 90 days without doing performance ratings and as a result some of our

within-grade step increases were held up pending this new system and it was for 90 days. So we were in a state during that period.

Q. What was used as the basis for other personnel actions?

A. Personnel actions, if there was a satisfactory performance as of the 30th of September of that year then other performance — other personnel actions that involved performance or had performance requirements could go ahead and proceed based upon the performance rating that was given on the 30th of September.

Q. What happened if their rating was unsatisfactory?

A. Then some type of action was either in progress to improve the performance or some type of disciplinary action might have been pursued. It's difficult to answer the question. I would have to know specific cases. Cases were handled differently, depending upon the nature of the case, the situation involved.

Q. Are you familiar with the removal of Mr. Lovshin?

A. I am today. At the particular time I was not.

Q. In this specific instance which — what would your personnel evaluation program at that time have provided for as the basis of an action against Mr. Lovshin?

A. If the performance was less than satisfactory management would have given the employee a notice, either verbally or in writing or both, stating that the performance was less than satisfactory. Stating how the employee could improve the performance, perhaps even setting some specific goals to be met to improve the performance, and would have reevaluated the employee after a period of time, whatever would have been provided in the notice period that the employee's performance was less than satisfactory.

Q. Each employee was provided a close-out evaluation as of October 1st?

A. As of the 30th of September, yes.

Q. The 30th of September.

A. Yes, right.

Q. And to your knowledge, was this done by Mr. Lovshin?

A. To my knowledge it was. Yes.

Q. Okay. And could this close-out evaluation have served as the basis for a personnel action?

A. Yes. Any type of personnel action on that — on a particular employee could have functioned as a — a personnel action that would have resulted as the result of the performance action could have been involved.

APPENDIX J

4113:SHG:sj
12700
29 Oct 1981

MEMORANDUM

From: S.H. Garrow (Branch Head, Code 4113)

To: A.J. Lovshin (Code 4113)

Subj: Notice of Proposed Termination of Employment

Ref:

(a) NSWSESINST 12750.1B

(b) FUSE/NSWSES Agreement Local R12-198 of 21 Jan 1981

(c) Performance Evaluation and Rating of 17 Jun 1981

(d) Performance Appraisal of 1 Oct 1981

Encl: (1) Pre-Action Investigation memo 5100:THF:plf of 27 Oct 1981

1. You are hereby notified of a proposed action to terminate your employment with NSWSES or the efficiency of the service in accordance with the provisions of references (a) and (b). This memorandum serves as the required 30 days advance written notice of the proposed action.

2. This proposal is based on unsatisfactory performance ratings as documented in references (c) and (d) and substantiated in the pre-action investigation memorandum of enclosure (1).

3. This is a proposal notice only and any answer you may make will be considered before a final decision is made. You have the right to reply orally and in writing, and to submit affidavits and other documentary evidence in support of your reply. Your reply is to be submitted to Mr. E. A.

Bergum (Code 4110 Division Head) no later than seven (7) calendar days from issuance of this memorandum.

4. You have the right to be represented by an attorney or other representative, except as may be disallowed under provisions of law of OPM regulations and you have the right to review the material on which this proposal is based.

5. You will be kept on active duty status during this notice period unless carried in an appropriate leave status.

S. H. GARROW

Copy to:
0600 4113.SHG
0640 FUSE:V. Arvis
4100
4101
4110

APPENDIX K

0640:MEA:rym
12830
21 Oct 1981

MEMORANDUM

From: Civilian Personnel Officer
To: Albert J. Lovshin, Code 4113

Ref: (a) 0640 memo 0640:MEA:rym 12830 of 30 Sep 1981
(b) FPM 830
(c) Fitness for Duty Examination

1. In the absence of a reply to reference (a), and in accordance with references (b) and (c), I am herewith providing you my final written decision concerning the submittal of an agency inititated disability retirement request. It is my decision that this request be forwarded to the Office of Personnel Management, Washington, DC for a determination in this matter.

2. You will remain in an active duty status until an initial decision is received from the Associate Director for Compensation. During this period you may be placed in a leave status with or without your consent.

3. Questions concerning this action should be addressed to your Personnel Management Specialist, Mrs. Muriel Ables, Code 0640, Civilian Personnel Department, extension 5112.

MICHAEL H. BYRON
Acting, Civilian Personnel Officer

Supreme Court, U.S.
FILED
DEC 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-882

In the Supreme Court of the United States

OCTOBER TERM, 1985

ALBERT J. LOVSHIN, PETITIONER

v.

DEPARTMENT OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE MERIT SYSTEMS PROTECTION BOARD SUPPORTING PETITIONER

EVANGELINE W. SWIFT
General Counsel

MARY L. JENNINGS
Associate General Counsel for Litigation

MARSHA E. MOUYAL
Reviewer for Litigation

PATRICIA A. PRICE
Attorney
Merit Systems Protection Board
Washington, D.C. 20419
(202) 653-7171

QUESTION PRESENTED

In the centerpiece of the Civil Service Reform Act of 1978, 5 U.S.C. Chapter 43, Congress provided a new mechanism for the removal or demotion of federal employees for unacceptable performance which was inextricably linked with new performance appraisal systems required by the Act. Congress intended these new provisions to benefit agencies, employees, and the public by providing a more effective and equitable means of managing the federal work force. The question presented is whether an agency may deny employees the substantive and procedural rights mandated by Chapter 43 when it removes or demotes those employees for unacceptable performance.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Merit Systems Protection Board was an intervenor below.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-882

ALBERT J. LOVSHIN, PETITIONER

v.

DEPARTMENT OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE MERIT SYSTEMS PROTECTION BOARD SUPPORTING PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A at 1-62) is reported at 767 F.2d 826. The decision of the Merit Systems Protection Board in this appeal (Pet. App. B at 1-12) is unreported. The decision of the Board in *Gende* v. *Department of Justice*, is reported at 23 M.S.P.R. 604 (App., *infra*, 1a-22a). The rule announced by the Board in *Gende* was overruled by the court in this case.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1985, and the mandate was issued on August 2, 1985 (Pet. App. C at 1-2). The petition for writ of cer-

tiorari was filed on November 18, 1985. The Board received its copy of the petition on November 22, 1985, and submits this brief in support of the petition pursuant to Rule 19.6 of this Court. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Portions of 5 U.S.C. (& Supp. II) 2301-2305, 4301-4315, 7501-7543 and 7701-7703 are reproduced at Pet. Apps. D, E, F and G.

STATEMENT

The petitioner Albert Lovshin was removed, effective November 30, 1981, from his Electrical Engineer position with the Department of the Navy for alleged unsatisfactory performance. On appeal to the Merit Systems Protection Board (the Board),[1] a question arose as to whether the removal was governed by the new provisions for actions based on unacceptable performance which Congress enacted in the Civil Service Reform Act of 1978 (Reform Act), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* The Board's presiding official found that the Reform Act's new provisions at 5 U.S.C. 4302-4303 (Pet. App. D at 2-5) were not applicable and he sustained the removal action under other provisions of the civil service law found at 5 U.S.C. (& Supp. II) 7501 *et seq.* (Chapter 75) (Pet. App. E at 1-2). Pet. App. B at 3-4. The presiding official's decision was issued before the Board's decision in *Gende* v. *Dep't of Justice*, 23 M.S.P.R. 604 (1984) (App., *infra*, 1a-22a), which held that 5 U.S.C. (& Supp. II) 4301 *et seq.* (Chapter 43) was the exclusive proce-

[1] The Board is an independent, adjudicatory agency which hears and decides appeals from personnel actions taken against federal employees (5 U.S.C. 1205(a), 7701(a)). Appeals are heard first by a Board presiding official or administrative law judge (5 U.S.C. 7701(b); Pet. App. G at 1), who issues an initial decision. A party may petition the full Board for review of the initial decision or may instead seek judicial review (5 U.S.C. 7701(e), 7703(a)(1)).

dure for performance-based actions effected after October 1, 1981, and that Chapter 75 was no longer available for such actions (App., *infra*, 14a). The Office of Personnel Management, which is the only agency authorized under 5 U.S.C. 7703(d) to seek judicial review of the Board's decisions, did not seek review of *Gende*.

The petitioner sought review directly in the United States Court of Appeals for the Federal Circuit. The Board intervened and requested the court to remand the appeal to allow the Board to consider whether the action was properly taken under Chapter 75 in light of the Board's intervening decision in *Gende* (Pet. App. A at 3-4). Although the case was originally argued before a three-judge panel, the court issued an en banc decision from which all members of the original panel, and two others, dissented. The court overruled the Board's decision in *Gende*, and held that the agency had the option to proceed under Chapter 75 in lieu of Chapter 43 to effect petitioner's removal (Pet. App. A at 4). The court sustained the removal action under Chapter 75 (Pet. App. A at 4-5). The court found, however, that the record was not adequate to rule on the petitioner's claim that he was entitled to remain on the agency's rolls until the Office of Personnel Management made an initial decision on the disability retirement application which the agency had filed on his behalf. The court therefore remanded the case to the Board for a determination of whether the petitioner had any entitlement to back pay (*id.* at 43-44).

The Board adopts the particulars contained in petitioner's statement with two exceptions. This case is the first time the Board has supported a petition for writ of certiorari, although it is not the first time the Board has intervened in a court of appeals proceeding. Additionally, the Board takes no position on whether the agency violated the regulation at 5 C.F.R. 831.1206 (1983) (Pet. App. H at 1) governing disability retirement applications. We believe this issue should be addressed by the Board on remand following this Court's review of the central question presented here.

REASONS FOR GRANTING THE PETITION

1. The decision below is the most important judicial decision to date interpreting the Civil Service Reform Act of 1978. This case presents issues of substantial public importance because the decision guts Congress' new statutory scheme for removing and demoting federal employees based on unacceptable performance. The decision deprives federal agencies, employees, and the public of the substantial benefits Congress intended to confer when it comprehensively reformed the civil service laws in 1978. This is the first time since its establishment in 1978 that the Board has filed a brief supporting a petition seeking the Court's review of a matter involving the civil service laws.

Described as "the most comprehensive reform of the Federal work force since passage of the Pendleton Act in 1883," the Reform Act's central task was to "[a]llow civil servants to be * * * hired and fired more easily, but for the right reasons." S. Rep. 95-969, 95th Cong., 2d Sess. 1, 4 (1978), *reprinted in* 2 House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *No. 96-2, Legislative History of the Civil Service Reform Act of 1978*, at 1465, 1468 (Comm. Print 1979) [hereinafter cited as *Leg. Hist.*]. Congress found that the existing performance appraisal systems were glaringly ineffective and that it was almost impossible to take personnel actions against employees for unacceptable performance. S. Rep. 95-969, *supra*, at 2, 9. To correct these defects Congress amended Chapter 43 to establish a single, integrated framework which linked the results of new agency performance appraised systems to a variety of performance-based actions, including removal and demotion actions. 5 U.S.C. 4302(a)(3) and (b)(6) (Pet. App. D at 2-3). Congress also established new procedures in Section 4303 for actions based on unacceptable performance. *Id.* at 3. Chapter 43 was viewed as the centerpiece of the Reform Act, and it was intended to benefit agencies, employees and the public by providing a more effective and

equitable means of managing the federal work force. S. Rep. 95-969, *supra*, at 4, 9-10.

In *Gende* the Board found persuasive indications in the Reform Act and its legislative history that Congress intended agencies to rely on Chapter 43, not on Chapter 75, to effect performance-based removal and demotion actions after October 1, 1981—the date Chapter 43 was fully operational (App., *infra*, 7a). In the decision below, the court of appeals overruled *Gende* and held that Chapter 75 [2] was still available for performance-based adverse actions effected after October 1, 1981 (Pet. App. A at 38). The court further held that agencies could rely, in the alternative, on both Chapters 43 and 75 to effect actions based on unacceptable performance, and that none of the substantive or procedural requirements of one chapter applied to the other chapter. *Id.* at 16, 37, 40.

The decision below clearly contravenes the Reform Act by authorizing agencies to continue to rely on Chapter 75 for performance-based removal and demotion actions and to completely ignore the statutory framework in Chapter 43 which Congress expressly created for such actions. Under the majority's analysis, a Chapter 75 action for unacceptable performance need not be based on the performance standards and critical elements which Congress required in 5 U.S.C. 4302(b)(2) be communicated to each employee. Thus, in one ill-considered stroke the majority has disassembled Chapter 43 by severing the link which Congress expressly established between performance-based actions and the new performance appraisal systems required under the Reform Act. Additionally, the decision deprives approximately 1.8 million federal employees covered by Chapter 43 of two substan-

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[2] Chapter 75 provides for suspension, removal, and demotion actions "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a) (Pet. App. E at 1). Prior to the Reform Act, agencies took actions based on unacceptable performance under Chapter 75.

tive statutory rights for which Congress provided in Chapter 43 and which are not present in Chapter 75: the right to reasonable performance standards and to an opportunity to demonstrate acceptable performance before the agency proposes a removal or demotion action based on unacceptable performance. 5 U.S.C. 4302(b)(1) and (6) (Pet. App. D at 2-3).

Finally, the court's decision has far-reaching and disturbing implications for both the civil service system and the public it was intended to serve. There is now little incentive for agencies to draft performance standards for their employees which comply with the statutory requirements in Section 4302(b)(1) since those standards are irrelevant in Chapter 75 performance actions. Because an agency never need rely on Chapter 43 for removal and demotion actions, the court's decision makes it a nullity with respect to those actions. As a result, agencies, employees, and the public alike are deprived of the substantial benefits Congress expected to confer in Chapter 43 by establishing new performance appraisal systems which provided a more effective and equitable means of managing the federal work force. It is difficult to believe that Congress would have constructed such a careful framework merely to have it ignored. The court's decision not only contravenes the Reform Act but is retrogressive as well, taking civil service reform a giant step backward. The majority decision returns performance-based actions to their pre-Reform Act status when there was no necessary or effective link between these actions and agency performance appraisal systems.

2. The Federal Circuit's decision reflects substantial differences among its judges. Five judges agreed with the Board's decision in *Gende* and found that both the Reform Act and its legislative history supported the conclusion that Congress intended Chapter 43 to be the exclusive procedure for performance-based removals and demotions once that chapter was fully implemented. Pet. App. A at 45, 59. Further, the dissenting judges clearly did not

view this question as a close one, and they sharply criticized the majority opinion as "astonishing" and "erroneous as a matter of law" (*id.* at 51 (Skelton, J., dissenting, joined by Kashiwa, Bennett, Miller & Newman, JJ.)); see also *id.* at 60 (Newman, J., dissenting, joined by Kashiwa, Bennett & Miller, JJ.).

3. Review by this Court is warranted because the decision below clearly conflicts with the applicable decisions of this Court in three significant respects. First, the decision departs from the well-established principle that an administrative agency's construction of the statutes it is charged with administering is due substantial deference. *E.g.*, *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 27-28; *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Although the court below allowed the Board to intervene in this case and to defend its decision in *Gende*, the court ultimately refused to accord any deference to the *Gende* decision. Second, the decision contravenes the well-established principle that a court has no authority to sit as a committee of review and to reorder the priorities Congress selected in enacting a statute. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 194-195 (1978). Based on its erroneous criticisms of the statutory scheme, the decision below eviscerates the exclusive procedures Congress enacted for performance actions and has resurrected in their place the pre-1978 procedures which Congress soundly rejected. Third, the decision violates the fundamental rules of statutory construction enunciated by this Court. Although this Court has stated that the judicial task is to "look to the provisions of the whole law, and to its object and policy" (*Richards* v. *United States*, 369 U.S. 1, 11 (1962)), the decision below ignores the central purpose of the Reform Act. Similarly, this Court has warned that statutory construction confining itself to the bare words of the statute is dangerous because "literalness may strangle meaning." *Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962), quoting *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44

(1946). Yet, the Federal Circuit's decision was based on just such a literal approach.

4. Under the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 39 *et seq.*, the Federal Circuit was vested with exclusive jurisdiction of all appeals from the Board arising under 5 U.S.C. 7703(b)(1) and (d). Thus, because of the special status of the Federal Circuit, the decision below already has nationwide impact and review by this Court is particularly appropriate to address the important question of federal law presented in this case.

ARGUMENT

I. THE COURT OF APPEALS FLOUTED THE LAW WHEN IT SUBSTITUTED ITS JUDGMENT FOR THE BOARD'S AND WHEN IT REFUSED TO ACCORD THE BOARD'S DECISION THE DEFERENCE DUE AN AGENCY'S INTERPRETATION OF THE STATUTE IT IS CHARGED TO CONSTRUE

The court of appeals flouted the law of this Court when it concluded that "the usual deference which a court must give the interpretation of a statute by the agency charged with its administration is not appropriate in this instance because the MSPB itself has not taken a consistent position" (Pet. App. A at 4). Despite its characterization of the *Gende* decision as "thorough and perceptive" (Pet. App. A at 30), the court cited three reasons to excuse its refusal to accord *Gende* normal judicial deference. First, ths court found that *Gende* modified the Board's earlier decision in *Wells* v. *Harris*, 1 M.S.P.B. 199 (1979). Second, the court stated that *Turnage* v. *United States*, 230 Ct. Cl. 799 (1982), and *Kochanny* v. *Bureau of Alcohol, Tobacco & Firearms*, 694 F.2d 698 (Fed. Cir. 1982) constituted precedent as to the issue addressed in *Gende*, and that *Gende* departed from the analysis in those cases (Pet. App. A at 4). Finally, the court opined that the Board itself had acknowledged that *Wells* has generated inconsistent Board decisions. *Id.* at 30. The Court then

proceeded to essentially ignore the Board's analysis in *Gende*.[3] All the reasons advanced by the court in support of its refusal to accord ordinary deference to *Gende* are either flawed or irrelevant to the question.

The question of deference does not even arise when an issue can be resolved either by the express language of the statute being construed or by necessary implication. *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31, 36 (1981). For the reasons set forth (pages 13-22, *infra*), the Board's holding in *Gende* flows directly from the "necessary implications" of the Reform Act, and the question of administrative deference need not be addressed. However, even if the *Gende* holding is not viewed as ineluctable, and this was the court of appeals' view (Pet. App. A at 31), the question then becomes whether the court "should defer to [the Board's] judgment as a permissible construction of the [Reform] Act or instead disregard the agency's view and proceed to construe the statute based on its own view of what would best serve the purpose and policy of the Act." *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. at 36. Because the court's reasons for its failure to accord ordinary deference do not withstand scrutiny, and because the court failed to consider factors that this Court has stated compel deference, the court's views must be rejected.

The court incorrectly found that the *Gende* decision modified *Wells*. By its terms, the issue in *Wells* concerned removals and demotions for unacceptable performance taken prior to October 1, 1981—the date by which federal

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[3] Although the court made a bow in the direction of the Board's analysis in *Gende*, what it had to say about that analysis is not comprehensible. The court stated that the objective of the Board in *Gende* was "to interpret the [Reform Act] in a manner which would give effect to merit principles [found in 5 U.S.C. 2301(b)], an objective clearly intended by Congress" (Pet. App. A at 31). The Board nowhere mentioned merit principles in *Gende*. Instead, the Board looked to the language of Chapter 43 and analyzed the legislative history of that chapter.

agencies were required by the Reform Act to have performance appraisal systems in place. See 5 U.S.C. 4302 (b) (2). As the Board stated in *Wells*, "the central issue presented here is whether, and if so under what limitations, removal or demotion actions based on 'unacceptable performance' may be taken under § 4303 against employees for whom a performance appraisal system has not yet been established under § 4302." *Wells*, 1 M.S.P.B. at 200. The Board then held that Chapter 75 was available for performance-based actions, but that holding was clearly limited to actions taken before October 1, 1981 (*id.* at 235-36). The issue in *Gende* was how those actions were to be effectuated after October 1, 1981 (App., *infra*, 1a, 4a). Thus, it is abundantly clear that *Wells* and *Gende* deal with two distinctly different issues, and *Gende* cannot be viewed as modifying *Wells*[4] in a manner that permits the court of appeals to deny *Gende* deference.

Similarly, the court of appeal's statement that *Wells* generated Board decisions which the Board acknowledged are inconsistent does not support the court's refusal to accord deference to *Gende*. The Board did, in *Gende*, acknowledge inconsistencies (App., *infra*, 6a n.5), but those inconsistencies related to actions taken prior to October 1, 1981, and thus have no impact at all upon the issue now before this Court. Furthermore, even assuming, *arguendo*, that the Board changed its perception of the Reform Act between *Wells* and *Gende*, as the court of appeals would have it (Pet. App. A at 30), this Court has made it clear that such a change is not sufficient to cause a court to fail to accord deference to an agency's interpretation of a statute. *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 25.

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[4] The Board stated in *Gende* that "to the extent" *Wells* "allows" for the interpretation that agencies may effect performance-based Chapter 75 actions after October 1, 1981, it must be modified (App., *infra*, 6a-7a). In so stating, the Board simply recognized that *Wells* could be misread.

In *Chevron U.S.A. Inc.* the Environmental Protection Agency (EPA) had changed its definition of the term "source" for purposes of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 *et seq.*, and the United States Court of Appeals for the District of Columbia concluded that because of the change in definition no deference was due to EPA's interpretation. *Chevron U.S.A. Inc.*, slip op. 3. This Court flatly rejected the court of appeals' conclusion as to deference. The Court made it clear that an agency may change its interpretation of a statute when Congress has not directly addressed the precise question at issue, and that in such instances deference is due the agency's interpretation. *Chevron U.S.A. Inc.*, slip op. 25; *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 485 (1979) (This Court is reluctant "to adopt the rigid view that an agency may not alter its interpretation in light of administrative experience."). Similarly, the Board's interpretation in *Gende* must be accorded deference, even in the presence of inconsistencies. As the court of appeals admitted, *Gende* is both "thorough and perceptive" (Pet. App. A at 30). Deference is also particularly appropriate because of the Board's status as an independent adjudicatory agency, and because in *Gende* the Board's interpretation necessitated a "full understanding of the force of the statutory policy in the given situation" that "depended upon more than ordinary knowledge" respecting the matter in issue. *Chevron U.S.A. Inc.*, slip op. 6.[5]

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[5] Although consistency concededly is a factor to be considered by a court in deciding whether to accord deference to an agency interpretation (*SEC* v. *Sloan*, 436 U.S. 103, 117-18 (1978), quoting *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287 n.5 (1978)), any differences between *Gende* and *Wells* do not constitute "a path of * * * tortured vacillation and indecision" such that deference should not be accorded. *Secretary of the Interior* v. *California*, 464 U.S. 312, 320 n.6 (1984).

Finally, the court of appeals incorrectly found the *Turnage* and *Kochanny* decisions to be precedential decisions to which that court was bound to defer (Pet. App. A at 23-24). In both those decisions the issue before the courts was how agencies were to effect performance-based removals prior to October 1, 1981, and the *Wells* rule was approved without reaching the *Gende* issue. In *Turnage*, the Court of Claims began with broad language, stating that the Reform Act "established two different, mutually exclusive procedural routes for disciplining employees on the basis of unsatisfactory job performance" (*Turnage*, 230 Ct. Cl. at 800). This statement would, at first blush, seem to apply to actions occurring after October 1, 1981. Later in its decision, however, the court characterized *Wells* as applying to the "*interim period* between the effective date of the Act and an agency's adoption of an appraisal system" and then implicitly adopted *Wells*. *Id.* at 802 (emphasis added). Thus, the court's statement that there are two mutually exclusive procedural routes cannot be read as an absolute principle applicable to post-October 1, 1981 actions.

Similarly, in *Kochanny*, the issue before the court was the propriety of *Wells*, not what was to be the rule after October 1, 1981. Indeed, in approving *Wells*, the *Kovhanny* court quoted and adopted language from *Drew* v. *United States Dep't of Navy*, 672 F.2d 197 (D.C. Cir. 1982), cert. denied, 459 U.S. 1072 (1983), which limits *Wells* to pre-October 1, 1981 actions (*Kochanny*, 694 F.2d at 701 (emphasis added)):

> In amending Chapter 43 in 1978 by establishing the aforementioned performance appraisal systems, Congress stipulated that such systems need not be fully implemented until October 1, 1981. Until such systems were established, *Wells* held that federal employees could not properly be dismissed under Chapter 43 and that *in the interim*, Chapter 75 dismissals could proceed on performance-based grounds.

Thus, it is clear that no precedent of the court of appeals bars the *Gende* rule, and that rule should stand.

Failure to accord deference is particularly egregious here where the Board is engaged in the "contemporaneous construction" of a new statute, the machinery of which it is charged with " 'setting * * * in motion, * * * making the parts work efficiently and smoothly while they are yet untried and new' " (*Power Reactor Devel. Co.* v. *International U., Etc.*, 367 U.S. 396, 408 (1961), quoting *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U.S. 294, 315 (1933)).

II. THE COURT GUTTED THE REFORM ACT AND IGNORED ITS LEGISLATIVE HISTORY IN HOLDING THAT CHAPTER 43 WAS NOT THE EXCLUSIVE PROCEDURE FOR PERFORMANCE-BASED ACTIONS AND THAT CHAPTER 75 WAS STILL AVAILABLE FOR SUCH ACTIONS

The question of whether Chapter 43 is the exclusive procedure for performance-based actions turns on the provisions of the Reform Act and its legislative history. In Section 4303, which is entitled "[a]ctions based on unacceptable performance," Congress provided in subsection (a) that: "[s]*ubject to the provisions of this section*, an agency may reduce in grade or remove an employee for *unacceptable performance*" (Pet. App. D at 3 (emphasis added)). In the legislative history, Congress stated that "[a]ctions based on unacceptable performance are governed by Chapter 43 * * *" (S. Rep. 95-969, *supra*, at 46). Despite this clear statutory language and legislative history, the majority held that "Chapter 75 remains available for performance-based adverse actions * * *" (Pet. App. A at 38). This makes no sense.

A brief review of the pertinent provisions of the Reform Act and its legislative history illustrates the majority's error. Prior to the Reform Act, there was no separate mechanism which governed actions based on unacceptable performance. Chapter 75 provided the only framework for actions based on either misconduct or on unacceptable performance. Congress found that the pre-

1978 Chapter 43 performance evaluation system was glaringly ineffective because it did not "distinguish employees whose performance is below an acceptable level to make the charges stick." S. Rep. 95-969, *supra*, at 9; see also *id.* at 39-40. Congress also found that the existing Chapter 75 procedures made it almost impossible to take action against employees "on the grounds of unacceptable performance" (*id.* at 40).

To achieve the central purpose of the Reform Act—to "[a]llow civil servants to be . . . hired and fired more easily, but for the right reasons" (S. Rep. 95-969, *supra*, at 4)—Congress acted to remedy these defects. Congress amended Chapter 43 to require agencies to establish new performance appraisal systems in Section 4302 that would provide a comprehensive framework for a wide variety of performance-based actions, including removal and demotion actions. Agencies were required by Section 4302(b)(2) to develop performance standards and critical elements for each position and to communicate these to each employee no later than October 1, 1981 (Pet. App. D at 2-3). Congress provided that an employee could be removed or demoted for unacceptable performance, which was defined in Section 4301(3) as performance "which fails to meet established performance standards in one or more critical elements of such employee's position" (*id.* at 2). To streamline and expedite the new procedures, Congress exempted performance actions from the "efficiency of the service" requirement which it retained for Chapter 75 actions. S. Rep. 95-969, *supra*, at 43. Congress also provided in Section 7701(c)(1) that actions taken under Section 4303 be reviewed by the Board under the "substantial evidence" standard, a less intrusive review than that authorized by the "preponderance of the evidence" standard (Pet. App. G at 1). Finally, Congress amended Chapter 75 to exclude Section 4303 actions from coverage of that Chapter. See 5 U.S.C. 7512(D) (Pet. App. E at 1); S. Rep. 95-969, *supra*, at 46.

In concluding that the Board "read into Chapter 75 a limitation which Congress expressed nowhere in the statute itself or in the legislative history" (Pet. App. A at 31), the majority opinion totally disregarded persuasive indications that Congress intended to prohibit use of Chapter 75 for actions based on unacceptable performance once Chapter 43 was operational, *i.e.*, on October 1, 1981. Besides the language of Section 4303(a) and the legislative history cited above, there are other Congressional statements bearing on this issue that the court ignored. In summarizing the Senate bill, Senator Percy, a cosponsor of the bill, stated that (2 *Leg. Hist.* 1614):

> Two adverse action procedures are established by S. 2640, one for actions based on unacceptable performance (incompetence), the other for actions based on other cause (such as misconduct).

Hence, Congress spoke in the plainest terms of its intention to establish two different and mutually exclusive procedures for unacceptable performance vis-a-vis misconduct. Despite this, the court used terms of art unique to Chapter 43 actions—"unacceptable performance" and "critical elements"—to describe actions it found could be brought under Chapter 75. The court held that an agency could bring an action "relying on Chapter 43 for '*unacceptable performance*' in a critical element with an *alternative, or additional* charge, under Chapter 75 * * *" (Pet. App. A at 37 (emphasis added)). It is clear that the court's holding that the same action can be brought under both Chapters 43 and 75 applies not only to "mixed" cases based on both performance and misconduct charges but also applies to actions based exclusively on unacceptable performance. See *Wilson* v. *Dep't of Health & Human Services*, 770 F.2d 1048, 1054 (Fed. Cir. 1985).

The dissenting judges in *Lovshin* correctly found that the majority's holding that Chapter 75 may still be used for actions based on "unacceptable performance" violated both Chapters 43 and 75 (Pet. App. A at 51). As noted

above, this holding is directly contrary to the unambiguous language in Section 4303(a) which provides that Chapter 43 governs removal and demotion actions for "unacceptable performance" (Pet. App. D at 3). The court's holding also contravenes Section 7512(D), which provides that Chapter 75, Subchapter II, is expressly inapplicable to "a reduction in grade or removal under section 4303 of this title * * *" (Pet. App. E at 1). See also S. Rep. 95-969, *supra*, at 46 ("[a]ctions based on unacceptable performance are governed by Chapter 43 * * *)". Finally, the majority's holding violates the Office of Personnel Management (OPM) regulation at 5 C.F.R. 432.205(b) (1983) (Pet. App. B at 4 n.1) by authorizing agencies to take performance-based Chapter 75 actions even after they have implemented performance appraisal systems which OPM has reviewed and approved. This OPM regulation allows Chapter 75 performance actions "[p]rior to the [agency's] completion of an approved [performance appraisal] system plan and the development of critical elements and standards * * *." There is no indication in the regulation that such actions are allowed thereafter. The court's failure to even mention this regulation is baffling in view of the fact that it was cited in *Gende* (App., *infra*, 6a) and was also quoted in full by the Board's presiding official in this case (Pet. App. B at 4). Like the Board, OPM is an administrative agency which Congress has vested with substantial authority for enforcing the Reform Act, and the court's failure to defer to OPM's interpretation was clearly error. *Chevron U.S.A. Inc.*, slip op. 6.

Despite the fact that the above statutory provisions and legislative history proscribe the use of Chapter 75 for actions based on "unacceptable performance," the court found nothing which, in its view, qualified as "a clear statutory provision or at least a single specific statement by Congress to the effect that Chapter 75, henceforth, could not be used for performance-based adverse actions" (Pet. App. A at 31). The majority's

retreat into this perplexing kind of literalism is exactly the kind of statutory misconstruction which this Court has disapproved because it "strangle[s]" the statutory meaning (*Utah Junk Co.*, 328 U.S. at 44). The majority opinion ignores the expressed purposes which Congress sought to achieve in amending Chapter 43. It is clear that the new Chapter 43 procedures which Congress created were primarily intended as a relief measure to remedy the defects in the existing Chapter 75 procedures. Undoubtedly, the astonishing notion that agencies would wish to return to the very same Chapter 75 procedures which they themselves had criticized as glaringly defective never occurred to Congress. Hence, it is understandable that the legislative history does not contain the "specific statement" (Pet. App. A at 31) which the majority opinion erroneously insists upon as the only valid indication of congressional intent. Particularly where Congress has drafted a comprehensive scheme of reform, one can hardly expect Congress to address how the mechanics of the statute will function in every situation (see *Lindahl* v. *Office of Personnel Management*, No. 83-5954 (Mar. 20, 1985), slip op. 23); let alone insist, as the majority opinion does, that Congress explicitly address itself to results that contradict the legislative purpose. Inexplicably, the court failed to undertake the appropriate judicial task of "look[ing] to the provisions of the whole law, and to its object and policy." *Richards*, 369 U.S. at 11, quoted in *Lindahl*, slip op. 23-24.

III. THE COURT'S DECISION DEPRIVES EMPLOYEES OF SUBSTANTIVE RIGHTS FOR WHICH CONGRESS EXPRESSLY PROVIDED, CREATES A PROCEDURAL LABYRINTH AND WILL RESULT IN INORDINATE DELAYS IN THE ADJUDICATION OF APPEALS

Before his removal, the petitioner was one of approximately 1.8 million employees in the competitive civil service who are covered by Chapter 43. See 5 U.S.C. 7301(1) and (2) (Pet. App. D at 1-2). The majority

opinion deprives these employees of two important substantive rights for which Congress expressly provided in Chapter 43: the right to have their work performance evaluated according to reasonable performance standards and the right to an opportunity to demonstrate acceptable performance before they are subject to a removal or demotion action based on unacceptable performance. See 5 U.S.C. 4302(b)(1) and (6) (Pet. App. D at 2-3); see also 5 C.F.R. 432.203(b) (1983). Although the majority opinion recognized that employees subject to Chapter 43 actions were entitled to these protections, the court ultimately characterized these rights as "procedural prerequisites" that were inapplicable to the petitioner's case because his agency had elected to process his removal action under Chapter 75 rather than under Chapter 43 (Pet. App. A at 40). In essence, the court held that by simply labeling its performance-based action as a Chapter 75 action, an agency could thereby deprive an employee of both the substantive and procedural protections for which Congress provided in Chapter 43. Not surprisingly, the five judges who dissented from the majority opinion characterized the court's analysis in support of this result as "erroneous as a matter of law" (*id.* at 51).

Prior to the enactment of the Reform Act, there was no statutory requirement that employees be evaluated according to performance standards that were based on objective criteria and tailored to the specific duties of their positions. Compare 5 U.S.C. (1976 ed.) 4302 *et seq.* and 5 U.S.C. 4302(b)(1) (Pet. App. D at 2); see also S. Rep. 95-969, *supra*, at 39, 42. Nor was there any statutory requirement that employees first be given an opportunity to improve their performance before they were removed or demoted for unacceptable performance. See *Angrisani* v. *United States*, 172 Ct. Cl. 439, 442-443 (1965). In amending Chapter 43, however, Congress mandated that agencies incorporate these requirements into their new performance appraisal systems. Thus, in

Section 4302(b)(1), Congress required that agencies establish performance standards which were tailored to the duties of each employee's position and which would "to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria * * *" (Pet. App. D at 2). The legislative history of this provision indicates that Congress intended to protect employees from the arbitrary labeling of their performance as unacceptable based on unreasonable or overly subjective performance standards. *Wells*, 1 M.S.P.B. at 222-23 (discussion of legislative history of objectivity requirement in Section 4302(b)(1)). Further, by requiring the use of objective criteria in performance standards and an opportunity to improve Congress also intended to benefit agencies by removing that element of subjectivity which had characterized the pre-1978 rating procedures and made agency performance actions difficult to defend. *Ibid.*; see also S. Rep. 95-969, *supra*, at 9-10. In Section 4302(b)(5) and (6), Congress also required, for the first time, that agencies assist employees in improving unacceptable performance and that employees be given an opportunity to demonstrate acceptable performance before agencies took action to reassign, demote, or remove them (Pet. App. D at 3). See also 5 C.F.R. 432.203(b) (1983).

The conclusion that an employee's rights to reasonable performance standards and to an opportunity to improve have a unique status in the statutory scheme is apparent not only from the legislative history, but also from the structure of the statute itself. These rights are not included in Chapter 75—yet another indication that Congress did not intend Chapter 75 to be available for performance-based actions once Chapter 43 was fully implemented. Rather, these rights are mandated in Section 4302 as integral requirements of agency performance appraisal systems and are separate and distinct from the procedural requirements found in Section 4303(b)-(d) (Pet. App. D at 3-4). Hence, it is clear

that Congress did not view these rights as mere "procedural prerequisites" (Pet. App. A at 40),[6] and the court disregarded the statute and legislative history in so finding.

The more fundamental error in the majority opinion was not so much its finding that these rights are procedural, but its conclusion that these substantive rights are totally dependent upon the label which the agency chooses to affix to the action, and hence, ultimately illusory. The court's opinion in *Wilson*, issued two months after *Lovshin*, illustrates how the *Lovshin* majority decision deprives employees of the right to reasonably objective performance standards for which Congress provided in Chapter 43. In *Wilson*, the court found that the agency's Chapter 43 action could not be sustained because it was based on a performance standard which the court found was "vague and inexact," "almost a parody of a proper standard," and "exactly the type of standard that left Wilson open to arbitrary appraisal in contravention of the Reform Act" (770 F.2d at 1053). Since the Chapter 43 action in *Wilson* had been effected before the *Lovshin* decision was issued, the agency had not relied on Chapter 75 or on both Chapters 43 and 75 as suggested by the *Lovshin* analysis. On this basis, the court in *Wilson* denied the agency's request to remand its defective Chapter 43 action to the Board for an immediate reconsideration under Chapter 75. *Id.* at 1055. Relying

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[6] Based on the statute and legislative history, the Board has held that the right to reasonable performance standards and to an opportunity to improve provided in Section 4302(b) are substantive rights which are not subject to the harmful procedural error standard in Section 7701(c)(2)(A) (Pet. App. G at 2). *Sandland* v. *General Services Administration*, 23 M.S.P.R. 583, 590 (1984) (agency has burden of showing that employee was afforded a reasonable opportunity to improve); *Callaway* v. *Dep't of Army*, 23 M.S.P.R. 592, 597 (1984) (when employee challenges performance standards, Board will review then under an abuse of discretion standard). In *Lovshin*, the court did not mention or consider the Board's decisions in *Sandland* and *Callaway*.

on *Lovshin*, however, the court did not foreclose the agency's request to proceed with a new action against Wilson under Chapter 75 "based on the same or similar set of operative facts * * *" (*ibid.*).[7] Hence, under the *Lovshin* majority's mistaken analysis of the statutory scheme, it seems that Congress intended to prohibit only Chapter 43 actions based on vague, inexact, and arbitrary performance standards, but intended to authorize Chapter 75 actions based on the same arbitrary and defective performance standards. We submit that Congress could not have intended such an anomalous and inherently inequitable result which violates both Chapters 43 and 75.[8]

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[7] The opinion in *Wilson* was written by a three-judge panel, two of whom were among the five judges who dissented from the majority opinion in *Lovshin*. This fact may explain why the court stopped short of expressly encouraging the agency to proceed with a Chapter 75 action and instead stated that "[b]ecause of the *Lovshin* decision" this question was left open. *Wilson*, 770 F.2d at 1055.

[8] Based on its erroneous finding (see note 3, *supra*), that the *Gende* decision was based on an analysis of the merit principles in 5 U.S.C. 2301, the court attempted to create a new remedy to prevent agencies from using Chapter 75 to circumvent Chapter 43 (Pet. App. A at 32-36). It is apparent, however, that the court's Chapter 23 remedy is so broad that it contravenes the express language of the statute, and at the same time was so narrowly applied by the court that it provides no protection to employees subjected to improper Chapter 75 performance actions. The court's finding that it is a prohibited personnel practice under 5 U.S.C. 2302(b)(11) to violate the merit principles found in Section 2301 (Pet. App. A at 33) contravenes the express language of the statute and its legislative history. H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 131 (1978); 2 *Leg. Hist.* 1973. The court failed to undertake the two-step analysis required to establish a prohibited personnel practice under Section 2302(b)(11). See *Wells*, 1 M.S.P.B. at 204. Even assuming the merit principles are self-executing, as the court erroneously found, the court refused to afford the petitioner the benefits of the merit principle found in Section 2301(b)(6) (Pet. App. F at 2), which arguably provides a right to an improvement period in performance-based removal actions.

In endorsing the use of two fundamentally different procedures, Chapters 43 and 75, for the same performance-based action the majority opinion has created a procedural labyrinth which will inordinately complicate the adjudication of appeals. The burden of proof, procedures, and applicable employee defenses are significantly different in Chapters 43 and 75. When agencies rely on both chapters in effecting the same action, the Board will be required to adjudicate the action under the second chapter selected by the agency if the action cannot be sustained under the first chapter. This will result in time consuming and expensive delays, contrary to congressional intent that the Board expedite appeals. 5 U.S.C. 7701(i); S. Rep. 95-969, *supra*, at 61-62. It is therefore ironic that the majority opinion objected to the simple requirement in the *Gende* decision that the agency show whether its action was based on misconduct or unacceptable performance (Pet. App. A at 32-33). Contrary to the court's findings, only in rare instances will agencies have difficulty in determining whether the charges they themselves have drafted are based on performance, misconduct, or both.

IV. THE COURT'S CRITICISMS OF THE PROCEDURES WHICH CONGRESS ESTABLISHED IN CHAPTER 43 WERE UNFOUNDED; AND EVEN ASSUMING THAT THESE CRITICISMS HAVE ANY VALIDITY, THE COURT IS WITHOUT POWER TO CHANGE THE STATUTE

A major factor the court relied on to support its holding that Chapter 43 was not the exclusive procedure for performance-based actions was its finding that if Chapter 43 was the only procedure available for such actions, "there would be serious omissions and anomalies" (Pet. App. A at 5). In essence, the majority concluded that agencies might experience difficulties in drafting performance standards for their employees, and that unless another mechanism—Chapter 75—was available, agencies

would be powerless to remove incompetent employees from their rolls (*id.* at 35). Judging from the majority's unsupported observations, one could conclude that the new Chapter 43 procedures Congress created have become an albatross for agencies rather than the streamlined, effective mechanism Congress intended.

The court's analysis is seriously flawed for several reasons. First, the statute does not require that federal agencies draft exact or totally objective performance standards; it requires only standards that are based on objective criteria "to the maximum extent feasible." See 5 U.S.C. 4302(b)(1) (Pet. App. D at 2). See *Shuman* v. *Dep't of the Treasury*, 23 M.S.P.R. 620, 626 (1984) (performance standards for professional positions where work is not susceptible to mechanical evaluation may allow for subjective criteria). Second, contrary to the court's implicit finding, performance standards are not immutable principles chiseled in granite which agencies are forbidden to revise. If an agency concludes that the performance standards it has identified for an employee's position are erroneous or incomplete, it may change the standards and still take an action under Section 4303 after communicating the change to the employee and providing an opportunity to improve. See 5 C.F.R. 432.203 (a) and (b) (1983). Third, the court's fear that agencies lack the ability to comply with the statutory requirements in Section 4302 for drafting performance standards is unfounded, and there is simply no evidence that exclusive use of Chapter 43 for performance actions will result in a flood of reversals and the retention of incompetent employees on agency rolls. Data on Chapter 43 actions indicate that agencies are having little difficulty in proving the adequacy of their performance standards before the Board.[9] Fourth, and most importantly, even

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[9] In fiscal year 1983, the only year for which detailed data is currently available, the Board's presiding officials reversed only 2% of Chapter 43 actions based on a finding that the agency's performance standards did not meet statutory requirements. Al-

assuming *arguendo* that the majority's criticisms of Chapter 43 procedures have any degree of validity, the court has no authority to sit as a committee of review, as it has done in the instant case, and to reorder the priorities Congress consciously selected as reflected in the clear language of the statute. *Tennessee Valley Authority*, 437 U.S. at 194-195.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

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I authorize the filing of this brief.

CHARLES FRIED
Solicitor General

DECEMBER 1985

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though the majority opinion in *Lovshin* alluded to the court's own experience in reviewing Chapter 43 appeals, the majority offered no data to substantiate its observations that agencies are unable to draft adequate performance standards. We are aware of only one published decision (*Wilson* v. *Dep't of Health & Human Services*, *supra*), in which the Court of Appeals for the Federal Circuit has found that the agency's performance standards were defective.

APPENDIX

MERIT SYSTEMS PROTECTION BOARD

CH07528410223

JOHN A. GENDE, APPELLANT

v.

DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS, AGENCY

Oct. 22, 1984

OPINION AND ORDER

This case presents the issue of whether agencies have the option of bringing performance-based actions under either 5 U.S.C. § 7513 or § 4303, or whether § 4303 is the exclusive procedure for such actions. In Part I, we discuss the agency's charges and the appellant's defense or rebuttal to those charges. In Part II, we review the legislative history of the Civil Service Reform Act of 1978[1] (the Reform Act), and we conclude that Congress intended agencies to utilize Chapter 43 as the exclusive procedure for performance-based actions which were effected after October 1, 1981. In Part III, we dis-

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[1] Pub.L. 94-954, 92 Stat. 1111.

cuss the standards which the Board will apply to determine if an action is based solely on performance and therefore must be taken pursuant to 5 U.S.C. § 4303. Finally, in Part IV, we find that it is appropriate to give this decision a partially prospective effect.[2]

Part I

The appellant was demoted under 5 U.S.C. § 7513 from his position of Electrician Foreman, WS-8, to the position of Correctional Officer, GS-7, at the Oxford, Wisconsin Federal Correctional Institution. The action was based on charges of careless workmanship and failure to follow agency policy and the National Electric Code which allegedly resulted in a $4,000 loss to the agency. The demotion action was effective on January 11, 1984.

On appeal to the Board's Chicago Regional Office the appellant contended that: (1) the agency was required to effect the action under 5 U.S.C. § 4303 and had failed to follow certain Chapter 43 procedures such as affording the appellant an opportunity to improve before taking action; (2) other foremen on the job site were accountable for those inmates assigned to the electrical detail and hence were accountable for the improper electrical practices cited in the charges; (3) the action was the result of harassment by two other foremen who had found the electrical practice violations and whom appellant had "written up" shortly before those foremen reported the appel-

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[2] This decision will be fully effective on the thirty-first day after the date of this decision. For the application of this decision to performance-based Chapter 75 actions effected before the effective date of this decision, see the discussion in Part IV, *infra*.

lant's alleged violations; and (4) the penalty was too harsh because appellant had no knowledge of the National Electrical Code before the action was taken and should not be penalized for his failure to follow this code.

Following a hearing, the presiding official sustained the charges, finding that the appellant was responsible for the electrical work at issue, and that the appellant's alleged lack of notice of the National Electrical Code and agency electrical policy was a damning admission which was no defense to the action or the penalty. Initial Decision (I.D.) at 2-4. In considering the appellant's contention that the agency was required to effect the action under § 4303, the presiding official noted that the agency defended the Chapter 75 action by asserting that it was based on misconduct relating to appellant's duties[3] rather than unacceptable performance under an approved performance appraisal system. The agency therefore contended that Chapter 43 was inapplicable. The presiding official found that the Board's decision in *Wells v. Harris*, 1 MSPB 199, 202, —— M.S.P.R. ——, —— (1979), stood for the proposition that an agency may bring a performance-based action under either § 7513 or § 4303, and concluded that there was no error in the agency's election to proceed under § 7513. I.D. at 3.

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[3] The gravamen of the agency's charges was directly related to one of appellant's performance standards which described the minimally satisfactory level for the element relating to "Ability To Execute the Specialty Craft." Agency File, tab 24.

> No more than three instances of violations of journeyman level trade standards or negligence with such violations resulting in replacement of materials or equipment which costs in excess of 5% of total project funds.

The presiding official also concluded that: (1) the appellant's claim of harassment was without merit; (2) the penalty was reasonable; and (3) the action promoted the efficiency of the service. The presiding official therefore sustained the action.

The appellant has filed a timely petition for review of the initial decision, reiterating his contention that the agency was required to take this action under § 4303. Pursuant to 5 U.S.C. § 7701(e)(1), the appellant's petition is GRANTED.

Part II

As a preliminary matter, we first consider whether the Board's decision in *Wells*, *supra*, disposes of the issue of whether agencies have the option of electing either Chapter 75 or Chapter 43 for performance-based actions effected after October 1, 1981. In *Wells*, the Board examined the propriety of Office of Personnel Management (OPM) interim regulations for Chapter 43 which authorized agencies to take actions against employees for failure to meet performance standards which had not been established as part of a performance appraisal system that met the statutory requirements of Chapter 43, including review and approval by OPM. *See* 5 U.S.C. §§ 4302, 4304(b)(1). The Board concluded that Congress did not intend that employees be subjected to § 4303 actions in the absence of an OPM approved agency appraisal system that met the requirements of § 4302, and the Board ruled that the OPM interim regulations that authorized such actions were therefore invalid. *Wells*, *supra*, at 234, —— M.S.P.R. at ——. The Board further stated, however, that agencies need not wait until October 1, 1981, the date agencies were required to implement OPM approved performance ap-

praisal systems, to take performance-based actions because Chapter 75 was available for such actions. *Wells* at 202, 235-36, —— M.S.P.R. at ——, —— ——.

Although *Wells* contained language that has been broadly interpreted as allowing the invocation of Chapter 75 for any performance-based actions at any time, *see Wells* at 236, —— M.S.P.R. at —— n.90, that decision specifically addressed only regulations which established interim procedures in effect before October 1, 1981. Hence, the decision in *Wells* neither directly addressed nor resolved the question of whether Chapter 75 was available for performance-based actions effected after October 1, 1981. *Wells* also failed to dispose of the related question of whether an agency, once having developed an appraisal system and obtained OPM approval of it, was precluded from invoking Chapter 75 procedures for performance-based actions in lieu of Chapter 43 procedures. Notwithstanding these facts, both the Board and the courts have interpreted *Wells* as holding that agencies generally have an option to elect to pursue performance-based actions under either 5 U.S.C. § 4303 or § 7513. *See e.g., Hatcher v. Department of the Air Force*, 10 MSPB 159, —— M.S.P.R. —— (1982), *aff'd* 705 F.2d 1309 (11th Cir. 1983).[4] These court decisions concerned actions taken before October 1, 1981, and it is clear that the actions were taken under Chapter 75, or converted to

[4] *See also DeBose v. Department of Agriculture*, 700 F.2d 1262 (9th Cir. 1983); *Drew v. Department of the Navy*, 672 F.2d 197, 200 (D.C.Cir. 1982); *Kochanny v. Bureau of Alcohol, Tobacco & Firearms*, 694 F.2d 698, 701 (Fed.Cir. 1982); *Darby v. Internal Revenue Service*, 672 F.2d 192, 195 (D.C. Cir. 1982).

Chapter 75 pursuant to *Wells*, because the agencies involved did not have performance appraisal systems in place. In the absence of such systems, the agencies would not have been able to take any performance-based actions if Chapter 75 procedures were not available for that interim period. OPM's regulations in Part 430 (performance appraisal) and Part 432 (reduction in grade and removal based on unacceptable performance) are consistent with this view. These regulations required agencies to implement an OPM approved performance appraisal system no later than October 1, 1981 but also permitted agencies to take performance-based actions under Chapter 75 prior to the completion of such systems. 5 C.F.R. §§ 430.201, 432.205(b) (1983). These courts did not address, nor was there a need to address, the exclusive application of Chapter 43 procedures for performance-based actions effected after the interim period. Consequently, we find that neither *Wells* nor the court decisions adopting *Wells* dispose of the issue raised in this appeal. In the wake of *Wells*, the question of whether and when an agency may convert a defective Chapter 43 action to a Chapter 75 action, however, has admittedly generated a number of inconsistent Board decisions.[5] Based on our analysis of the legislative history of the Reform Act, however, we find that reading *Wells* as

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[5] *See Price v. Department of Treasury*, 3 MSPB 314, —— M.S.P.R. —— (1980), 7 MSPB 6 (1981) (Board reverses defective Chapter 43 action and rejects agency motion to remand action, under *Wells*, for reconsideration as Chapter 75 action); *Young v. Department of the Navy*, 7 MSPB 7, —— M.S.P.R. —— (1981) (Board considers defective Chapter 75 action on its own motion). *See also Drew, supra*, at 205 n. 6 (dissenting opinion).

holding that agencies may effect performance-based Chapter 75 actions after October 1, 1981 is impossible to reconcile with specific provisions of the Reform Act, and that to the extent that *Wells* allows for such an interpretation, it must therefore be modified.

A review of the legislative history of the Reform Act indicates that Congress did not expressly state whether, in enacting Chapter 43, it was thereby prohibiting the use of Chapter 75 to effect performance-based actions. There are persuasive indications in the legislative history, however, that Congress intended performance-based removal and demotion actions to be effected exclusively under Chapter 43 procedures. One of the primary aims of the Reform Act was to simplify and expedite procedures to take action against employees whose performance was unacceptable. *See* S.Rep. No. 95-969, 95th Cong., 2d Sess. 2 (1978) (hereinafter referred to as *Senate Report*), *reprinted in* House Comm. on Post Office and Civil Service, 96th Cong. 1st Sess., *Legislative History of the Civil Service Reform Act of 1978*, at 1466 (Comm. Print No. 96-2, 1979) (hereinafter referred to as *Legislative History*), U.S. Code Cong. & Admin. News 1978, 2723. In explaining the need for new procedures to govern performance-based actions, Congress found that Chapter 75 procedures were ineffective and made it difficult to remove poor performers. Among the defects in the existing Chapter 75 procedures that Congress identified were "performance evaluation procedures [that] do not work well enough to distinguish employees whose performance is below an acceptable level to make the charges stick," as well as "inordinate procedural requirements and unreasonable standards." *Senate Report*

at 9, 40, U.S. Code Cong. & Admin. News 1978, at 2731, 2762.

To remedy these defects, Congress amended Chapter 43 to require agencies to establish new performance appraisal systems in § 4302 that would provide the basis for effecting a variety of personnel actions, including the removal and demotion actions specified in § 4303. The legislative history clearly demonstrates that Congress intended that agency decisions to remove or retain employees be based on the results of § 4302 performance appraisal systems:

> The purpose of section 203 is to provide for new systems of appraising employee work performance. The principal changes it makes in Chapter 43 of title 5, United States Code are the following:
>
> —Abolishment of present requirements of summary adjective ratings and appeals for performance ratings;
>
> —Establishment of revised performance appraisal system to be *used as a basis for developing, rewarding, reassigning, demoting, promoting, retaining, and removing employees;* and
>
> —Establishment of *new procedures* for taking action based on unacceptable performance.[6] (Emphasis supplied.)

The Congressional intent to interweave these new appraisal systems with performance-based actions is also reflected in the statutory language itself. Sec-

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[6] *Senate Report* at 39, U.S.Code Cong. & Admin.News 1978, at 2761.

tion 4302(b) requires that each performance appraisal system provide for:

> (2) . . . not later than October 1, 1981 . . . communicating to each employee the performance standards and critical elements of the employee's position;
>
> (3) evaluating each employee during the appraisal period on such standards;
>
> (4) recognizing and rewarding employees whose performance so warrants;
>
> (5) assisting employees in improving unacceptable performance; and
>
> (6) *reassigning, reducing in grade,* or *removing employees* who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance. (Emphasis supplied.)

Additionally, it is clear that another purpose Congress wished to achieve in enacting this integrated framework for performance-based actions was to protect employees from actions based on *ad hoc* performance standards that agencies had never communicated to employees or actions based on standards that had been developed at the unreviewed discretion of agencies.[7] Thus, to the extent that Chapter 75 actions are based on unreviewed or *ad hoc* perform-

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[7] *See* House Comm. on Post Office and Civil Service, *Civil Service Reform Act of 1978,* H.Rep. No. 95-1403, 95th Cong., 2d Sess. 21 (1978) ("no employee will be disciplined when performance standards and critical elements have not been adequately defined by an agency.") *See also Wells, supra,* 1 MSPB at 221-23, —— M.S.P.R. at ——-——.

ance standards such actions are clearly inconsistent with Congressional intent as shown in the Reform Act.

To expedite actions based on unacceptable performance, Congress also concluded that agencies should have the benefit of a less burdensome standard of proof than for actions based on misconduct.[8] In discussing this new standard Congress consistently distinguished Chapter 43 from Chapter 75 actions by referring to Chapter 75 actions as misconduct-based adverse actions, and these references are another persuasive indication that Congress intended Chapter 43 procedures to serve as the exclusive vehicle for performance-based actions. For example, in explaining the reasons for the adoption of a lower evidentiary standard, the Senate Report stated that:

> Moreover, there are some important differences mandated by the special nature of actions taken for unacceptable performance. An agency's assessment of an employee's overall performance in light of its needs and standards may be the most important part of the case. Yet it may be less susceptible to proof through traditional trial-type procedure than when the agency *takes an adverse action on the basis of employee miscon-*

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[8] 5 U.S.C. § 7701(c)(1) provides that "in the case of an action based on unacceptable performance described in section 4303 of this title" the agency action shall be sustained only if "supported by substantial evidence" and shall be sustained "in any other case" if supported by a "preponderance of the evidence." *See also* 5 C.F.R. § 1201.56(c). The substantial evidence standard is interpreted as authorizing a less intrusive review of the agency decision than the preponderance of evidence standard. *Parker v. Defense Logistics Agency*, 1 MSPB 489, 504, —— M.S.P.R. ——, —— (1980).

> *duct* which is linked to specific provable offenses. *Senate Report* at 44, U.S. Code Cong. & Admin. News 1978, at 2766. (Emphasis supplied.)

Additionally, we find it significant that the Conference Report that accompanied the bill in its final form before its enactment used the terms "actions based on unacceptable performance" and "performance cases" interchangeably in identifying the kind of actions which would be upheld if supported by substantial evidence.[9] *Legislative History* at 1980-81. Thus, this language clearly supports the view that Congress intended the Board to apply the substantial evidence standard to all performance-based actions. Since Congress provided in § 7701 that this standard was only applicable to § 4303 actions, the conclusion that Congress intended Chapter 43 to serve as the exclusive vehicle for performance-based removal and demotion actions is inescapable.[10]

Finally, we note that in discussing the procedures for Chapter 75 actions, Congress clearly drew a distinction between § 7513 actions and performance-

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[9] Although we have previously recognized that "unacceptable performance" as defined in § 4301(3) is a term of art, rather than a general term covering all types of poor performance, *see Wells, supra*, 1 MSPB at 235, —— M.S.P.R. at ——, this distinction does not dispose of the issue of whether Congress intended that all performance-based actions be brought under Chapter 43.

[10] Based on an analysis of the legislative history of the Reform Act, the Board has previously held that Congress intended the Board to apply the substantial evidence standard to agency actions under 5 U.S.C. § 5335 denying an employee's periodic within-grade salary step increase because of the clear connection between § 5335 and the requirements of Chapter 43. *Parker, supra*, 1 MSPB at 504, —— M.S.P.R. at ——.

based actions under § 4303: "Section 204(a) of the bill also substantially amends subchapter II of Chapter 75 . . . . *These provisions govern any such action where the basis of the agency action is misconduct or any other cause besides unacceptable performance. Actions based on unacceptable performance are governed by Chapter 43. . . .*" [11] *Senate Report* at 46, U.S. Code Cong. & Admin.News 1978, at 2768. (Emphasis supplied.)

As a general principle of statutory construction, the fact that a statute grants authority to carry out an action and prescribes procedures for how the action will be carried out serves as a persuasive indication that these procedures are mandatory, despite the fact that taking the action in the first place was discretionary. This maximum is known as *expressio unius est exclusio alterius* and its literal meaning is that the expression of one thing excludes another. *See generally* 2A C. Sands, *Sutherland Statutory Construction*, §§ 47.23-25 (4th ed. 1973); [12] 73 Am.Jur.2d Statutes § 212 (1974). In articulating this principle, the Supreme Court stated that "when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289, 49 S.Ct. 129, 132, 73 L.Ed. 379 (1929); *cf. American Sec. & Trust Co. v. Commissioners of D.C.*, 224 U.S. 491, 495, 32 S.Ct. 553, 554, 56 L.Ed. 856 (1912). Here, there are specific references in the statute and legis-

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[11] *See also* 5 U.S.C. § 7512, which excludes "a reduction in grade or removal under section 4303 of this title" from actions covered by Subchapter II of Chapter 75.

[12] The maxim of *expressio unius* is generally regarded as an aid to construction, rather than a rule. *See Sands, supra*, at § 47.23.

lative history that indicate that Congress intended Chapter 43 procedures to govern performance based actions and there are no indications that Chapter 75 procedures are permissible for such actions. The application of the maximum of *expressio unius* thus suggests that the utilization of Chapter 43 is mandatory for performance-based actions, and this principle is even more persuasive when, as here, the application of the procedures is statutorily required. 5 U.S.C. §§ 4302(a)(3) and (b)(6).

Based on the foregoing analysis, we conclude that Congress clearly intended to bifurcate performance-based actions from misconduct-based actions and to create new streamlined procedures for performance-based actions which were linked to § 4302 appraisal systems that Congress required be fully operational by October 1, 1981. Nearly three years have passed since this deadline date, and OPM has publicly stated that it has reviewed and approved the performance appraisal systems currently in use by all Federal departments and agencies.[13] Any conclusion that Congress intended to create, *sub silentio*, a hybrid category of performance-based actions in lieu of, or in addition to, § 4303 actions is simply untenable at this point in time. *See Drew*, *supra*, at 206 (Mikva, J., dissenting) ("It is not for this court or the Board to fashion a hybrid procedure and pronounce that it is just as good as anything Congress can do.") Such an interpretation would render Chapter 43 meaningless since agencies taking performance-based Chapter 75 actions could freely disregard the procedures which Congress provided for § 4303 actions and could likewise ignore the clear statutory requirements in § 4302

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[13] The Year in Review, United States Office of Personnel Management (1981) at 9-10.

mandating that the results of agency performance appraisal systems be utilized as the basis for making decisions to retain or remove employees. It is also clear that Congress expended considerable effort in creating the new Chapter 43 procedures [14] and the legislative history supports the view that this chapter was the centerpiece of the Reform Act. There is no indication in the legislative history that Congress intended Chapter 43 procedures to be invoked at the option of agencies if and when the agencies believed such procedures were more desirable than Chapter 75 procedures. The legislative history makes it clear that Congress envisioned that Chapter 43 would provide significant advantages to Federal agencies and employees as well as the public as a whole, which were not then and are not now present in Chapter 75. We believe that to allow agencies unfettered discretion in choosing to ignore such benefits could only have the effect of frustrating Congressional intent.

In sum, the Board holds that Congress intended agencies to utilize Chapter 43 as the exclusive procedure for performance-based actions effected after October 1, 1981. We further hold that, in light of this Congressional intent, § 7513 provides no authority for agencies to effect such actions after October 1, 1981. There are two situations where this rule is clearly inapplicable. Actions based on both performance and nonperformance factors fall within the cov-

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[14] Congress described the change in the standard of proof in Chapter 43 actions as the "most important part" of the proposed Chapter 43 provisions. *Senate Report* at 44. One of the sponsors of the Senate bill stated that the change in the evidentiary standard was a "single reform [which] alone is worth the tremendous effort that has been put into this legislation." *Legislative History* at 1727 (Statement of Senator Percy on Senate floor).

erage of Chapter 75, pursuant to 5 C.F.R. § 752.401 (a)(2) (1983).[15] Additionally, the rule is also not applicable to agencies and employees who do not fall within the coverage of Chapter 43 at all, as provided by statute or regulation. *See* 5 U.S.C. § 4301(1)(2); 5 C.F.R. § 430.201(c) (1983).

Finally, we find it appropriate to identify two possible exceptions to the rule, reserving judgment on any future exceptions as the law in this area evolves. Consistent with OPM guidance, agencies *may* bring Chapter 75 actions based on insubordination when the charges are based solely on an employee's intentional refusal to perform. *See* Federal Personnel Manual (FPM) Letter 432-1 at 2 (May 5, 1983). In such cases, we find that the procedures applicable to Chapter 43, such as the communication of elements and standards and the provision of an opportunity to demonstrate acceptable performance would serve no purpose and Congressional intent regarding Chapter 43 would not be furthered by mandating such procedures for these actions which are only indirectly related to performance. In such cases, however, the agency must prove, by preponderant evidence, that the charges are based on the employee's intentional refusal to perform as opposed to a mere failure to perform in order to invoke this exception. Alternatively, agencies faced with an employee's refusal to perform *may* bring such actions under Chapter 43

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[15] In recognizing this exception, we reverse judgment on the disposition of cases where the Board does not sustain the misconduct or nonperformance related charges. We also reserve judgment on cases where an appellant alleges that the agency acted in bad faith in adding a charge based on other than performance factors in order to bring that action within the coverage of Chapter 75.

procedures if the action is based solely on the employee's failure to "meet established performance standards in one or more critical elements" as specified in § 4301(3), after first providing the employee with an opportunity to demonstrate acceptable performance. *See Sandland v. General Services Administration*, 23 M.S.P.R. 583 (1984).

A second exception to this rule may be appropriate when the agency's charges are performance-based, but the agency is able to establish, by preponderant evidence, that there is a substantial likelihood that providing the employee with an opportunity to demonstrate acceptable performance before proposing the action will result in injury, death, breach of security, or great monetary loss.[16]

Part III Standards That The Board Will Apply In Determining If Actions Are Based Solely on Performance

At the outset, we find it appropriate to frame the rule we have articulated in this decision in terms of a rebuttable presumption. Thus, the Board will presume that a performance-based Chapter 75 action effected after October 1, 1981, is void *ab initio* unless the agency shows, by preponderant evidence, that: (1) the action is based solely on misconduct rather than performance or, as noted above, on both; or (2)

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[16] These factors are identical to those which the Board has discussed in reference to absolute performance standards in *Callaway v. Department of the Army*, 23 M.S.P.R. 592, 598 (1984). In that decision, the Board found that an absolute performance standard (a standard that leaves no room for errors) might be appropriate where a single failure to meet the standards could result in injury, death, breaches of security, or great monetary loss.

the action is excluded or excepted from the rule, as described in Part II; or (3) that the action should otherwise be excepted from the rule based on public policy or other considerations.[17]

In determining whether Chapter 75 actions are based on performance or misconduct, the Board will utilize two standards. First, the Board will presume, subject to agency rebuttal by preponderant evidence, that charges which directly relate to an appellant's critical or non-critical elements[18] or performance standards are performance-based, irrespective of whether the agency is able to frame the charges in terms of misconduct. Since many violations of performance standards can easily be characterized as misconduct, no purpose would be served by adopting a standard that attempts to distinguish performance and misconduct actions based solely on the agency's characterization of the charges.[19]

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[17] The agency's burden of establishing that it has invoked Chapter 75 for a *bona fide* reason is analogous to an agency establishing, in RIF actions, that it invoked RIF procedures for a *bona fide* reason. *Losure v. Interstate Commerce Commission*, 2 MSPB 361, 366, —— M.S.P.R. ——, —— (1980).

[18] One consequence of the Board's ruling in this decision and of the application of this standard is that agencies may not take any removal or demotion actions based on an employee's non-critical elements. Such performance-based actions are not available under Chapter 75 and are not included in § 4303 since § 4303 actions must be based on a failure to meet critical elements. 5 U.S.C. § 4303(b)(1)(A)(ii). In such cases, however, if the agency were to reassign the employee, any such reassignment would not be appealable to the Board under Chapter 43. *See* 5 U.S.C. §§ 4302(a)(3), (b)(6); 4303(e).

[19] The term "misconduct" encompasses a wide range of meanings and has been variously defined to include intentional

A second standard the Board [20] will utilize to determine whether Chapter 75 actions are based on performance or misconduct may be stated as follows: The Board will also presume, subject to agency rebuttal by preponderant evidence, that charges which directly relate to the appellant's duties and responsibilities, or work-related tasks, functions, and objectives, as shown in the employee's position description or by other relevant evidence, are performance-based,[21] and may not, therefore, be taken under § 7513.

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wrong-doing as well as malfeasance, mismanagement, and dereliction of duty. 58 C.J.S. Misconduct (1948). Thus, if a clerk-typist's performance standard describes minimally acceptable performance as no more than three errors per page, the agency would be precluded, under the rule we announce today, from defining two errors per page as carelessness and bringing a Chapter 75 action based on misconduct. This result is thus consistent with Congressional intent that agencies may not subject employees to performance-based actions based on performance standards or expectations which have not been communicated to them. *See* note 7, *supra*. By the same token, employees may not escape § 4303 actions by asserting that their failure to meet performance standards for critical elements can be characterized as misconduct and hence must be brought under § 7513.

[20] As a threshold matter, the Board's presiding officials will determine if either of these two presumptions are applicable to the agency's Chapter 75 action. If so, the presiding official will provide the agency with an opporunity to present evidence or argument to rebut the presumption and will make a ruling regarding whether the agency has properly invoked Chapter 75.

[21] This definition is substantially identical to the definition which OPM has developed for performance elements. FPM Chapter 430, Subchap. 2-1 (c) (1980).

Part IV Rationale For a Partially Prospective Application Of This Decision

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-6, 30 L.Ed.2d 296 (1971), the Supreme Court set forth three factors to apply in determining whether a rule of law should be applied only prospectively. First, "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . ." Second, the merits and demerits in each case must be reviewed by examining "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." The third factor discussed by the Court was a requirement to weigh any "inequity imposed by retroactive application."

With regard to the first factor, it is clear that the Board's ruling in this decision that Chapter 43 procedures are the exclusive means of effecting performance-based actions after October 1981, is a new rule of law requiring the Board to overrule or modify that portion of *Wells* and its progeny that has been interpreted as holding that performance-based Chapter 75 actions were available after the October 1981 deadline date. As discussed in Part II of this decision, neither *Wells* nor the court decisions affirming *Wells* foreclosed the question of whether Congress intended Chapter 43 to serve as the exclusive procedure for performance-based actions taken after the date that agencies were required to have implemented OPM approved performance appraisal systems.

In terms of the second and third factors, we conclude that a totally retroactive application of this

decision would impose a substantial inequity on agencies which have relied on *Wells* to take performance-based Chapter 75 actions, and would not serve to advance the application of the new rule announced here while compounding the inconsistency that was generated in the wake of Board decisions following *Wells* regarding what procedures were applicable in cases remanded under *Wells*.[22] The purpose of the rule announced here is to assure that performance-based actions are effected in accordance with the intent of Congress. To reverse all performance-based actions effected under Chapter 75 before the effective date of this decision but after October 1, 1981, would, we find, frustrate this intent and advance no other important purpose. *See Linkletter v. Walker*, 381 U.S. 618, 636-7, 85 S.Ct. 1731, 1741-2, 14 L.Ed.2d 601 (1965). It is also clear, however, that a completely prospective application of this decision would frustrate Congressional intent to require agencies to utilize Chapter 43 procedures for performance-based actions taken after October 1, 1981, and would impose substantial inequities on appellants who may not have been afforded the substantive and procedural safeguards applicable to Chapter 43 actions.[23]

In light of the above, we conclude that a partially prospective application of this decision is the most

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[22] *See* note 5, *supra*.

[23] Before proposing a § 4303 action, agencies must provide the employee with an opportunity to demonstrate acceptable performance. *See* 5 U.S.C. § 4302(b)(6); 5 C.F.R. § 432.203(b) (1983). *See also Sandland, supra*. There is also a one-year limitation on the instances of unacceptable performance on which the action may be based and a requirement for the concurrence of a higher-level official in the decision. 5 U.S.C. § 4303(b), (c).

appropriate action that will balance the interests of both agencies and appellants and further the application of this rule in as equitable a manner as possible. This decision will be fully effective on the thirty-first day after the date of this decision. This 30-day period will provide agencies which have initiated or effected performance-based Chapter 75 actions with an opportunity to reconsider these actions in light of this decision. The Board will apply this decision in its entirety to agency actions that are effected[24] after this 30-day period, and such actions which have been improperly effected under Chapter 75 will be reversed. However, in cases where the agency effected the action before the end of this 30-day period, such as the instant action, the Board will provide the agency with an opportunity to elect to have the action reconsidered under Chapter 43 standards and adjudicated as a Chapter 43 action after submission of further argument by the parties. If the agency elects to proceed in that manner, with the one exception noted herein, its action will be adjudicated solely on the basis of the present record with no further opportunity to submit proof of the merits of the charge. Similarly, the appellant may not argue the merits of any affirmative defense which was or could have been raised in the context of the Chapter 75 action. The single exception to the rule that the record may not be supplemented is that the parties may introduce testimonial or documentary evidence regarding compliance with Chapter 43 procedures, and the appellant may raise any defense or rebuttal applicable to Chapter 43 actions. In the alternative, the

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[24] As a general rule, the effective date of an action will be the effective date shown on the personnel action (SF-50) form.

agency may show that its action falls within one of the exceptions to the rule discussed herein and is thus a proper performance-based Chapter 75 action.

Accordingly, the initial decision of the presiding official in this appeal is VACATED and the appeal is REMANDED to the Chicago Regional Office for further adjudication consistent with this opinion.

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No. 85-882

In the Supreme Court of the United States

OCTOBER TERM, 1985

ALBERT J. LOVSHIN, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that federal agencies retain the discretion to bring performance-based personnel actions against government employees under Chapter 75 of the Civil Service Reform Act of 1978.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A62) is reported at 767 F.2d 826. The decision of the Merit Systems Protection Board (Pet. App. B1-B11) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C1) was entered on June 21, 1985. On September 10, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to and in-

cluding November 18, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the interpretation of two provisions of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.*, pursuant to which federal agencies may take remedial actions against their employees. Prior to the enactment of the CSRA, all actions to remove or discipline a government employee—including all performance-based actions—were processed under Chapter 75 of Title 5, United States Code (5 U.S.C. 7511 *et seq.*) (Pet. App. A5-A6). The CSRA did not alter the basic features of Chapter 75; in particular, the Act preserved the general provision that permits agencies to take action against an employee based upon "such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a). In any such action, the agency's case must be supported by a preponderance of the evidence (5 U.S.C. 7701(c)(1)(B)), and the agency bears the burden of proving that the action taken "will promote the efficiency of the service." 5 U.S.C. 7513(a).

While Chapter 75 was left largely unchanged, Congress, in enacting the CSRA, did make major revisions to Chapter 43 of Title 5, United States Code (5 U.S.C. 4301 *et seq.*). Of particular relevance to this case, Congress amended Chapter 43 to establish a new performance appraisal system based upon the "elements" of an employee's position. 5 U.S.C. 4302. Under the new system, agencies are authorized to "reduce in grade or remove an employee for *unacceptable performance*" under procedures described in the statute. 5 U.S.C. 4303 (emphasis added). The

CSRA defines "unacceptable performance" as "performance of an employee which fails to meet established performance standards in one or more *critical elements* of one's position." 5 U.S.C. 4301(3) (emphasis added). Thus, the only performance-based actions that may be processed under Chapter 43 are those based upon an employee's failure to meet a critical element of his position;[1] actions based upon generalized poor performance that does not fit within the confines of a critical element do not come within the terms of Chapter 43. The issue in this case is whether the provisions of Chapter 43 are the exclusive means by which an agency may bring a performance-based action against an employee.

2. Petitioner was employed by the Department of the Navy as a civilian engineer. On October 29, 1981, the Navy issued petitioner a Notice of Proposed Termination based upon unsatisfactory performance of his duties. A Notice of Final Decision, dated November 13, 1981, advised petitioner that he would be removed from employment effective November 30, 1981, for the reasons set forth in the proposed notice. On December 10, 1981, petitioner appealed his removal to the Merit Systems Protection Board (MSPB). Pet. App. A2-A3, A41, B1-B2.

In the meantime, the Navy, on October 21, 1981, had submitted to the Office of Personnel Management (OPM) an agency-initiated application for petition-

[1] The agency is held to a lesser standard of proof in a Chapter 43 proceeding than in a Chapter 75 case: actions taken under Chapter 43 are to be sustained if supported by substantial evidence, rather than a preponderance of the evidence. 5 U.S.C. 7701(c)(1)(A). In addition, there is no need for an agency to prove in a Chapter 43 proceeding that its action "will promote the efficiency of the service."

er's disability retirement based on the results of psychiatric evaluations. That application was approved by OPM on or about January 8, 1982, whereupon the Navy moved to dismiss as moot petitioner's appeal to the MSPB of his performance-based removal. The Navy's motion was granted, but, on July 23, 1982, OPM, acting on petitioner's request for reconsideration, reversed its initial decision and disallowed the Navy's disability retirement application. In response to the Navy's request for further reconsideration, OPM reaffirmed the disallowance on September 17, 1982. As a result of OPM's action, the Navy retroactively returned petitioner to his status as of November 30, 1981: removed for unsatisfactory performance. Pet. App. A41-A42, B2-B3.

Thereafter, petitioner renewed his appeal of the removal action to the MSPB, where the case was heard by a presiding official. See 5 C.F.R. 1201.4(a) and 1201.41. On January 20, 1984, the presiding official sustained the agency's removal of petitioner (Pet. App. B1-B11). The presiding official stated that, on the effective date of its action against petitioner, the Navy did not have in place a performance appraisal system that had been approved by OPM (*id.* at B3). See 5 U.S.C. 4302(b).[2] Thus, the pre-

[2] In fact, the presiding official was incorrect in this respect. OPM approved the Navy's performance appraisal system for employees at Grades GS-12 and below (petitioner had been employed as a GS-12) on October 8, 1980, and it approved the Navy's performance appraisal system for employees above Grade 12 on March 25, 1980. Cf. *Hazard* v. *Dep't of the Navy*, 24 M.S.P.R. 593, 595 n.1 (1984). However, the Navy did not begin using its OPM-approved performance appraisal systems until October 1, 1981. This chronology has no bearing on the correct disposition of this case, however, because the court of appeals held that agencies retain the discretion to take

siding official held that the Navy could not proceed against petitioner under the procedures established by Chapter 43 for personnel actions based upon "unacceptable performance" under such an approved appraisal system (Pet. App. B3-B4). However, the presiding official, citing *Wells* v. *Harris*, 1 M.S.P.B. 199 (1979), held that the Navy could proceed against petitioner under the procedures contained in Chapter 75, which, as previously explained, govern adverse actions based upon "such cause as will promote the efficiency of the service" (5 U.S.C. 7513(a)) (Pet. App. B4).[3]

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performance-based actions under Chapter 75 even after the implementation of Chapter 43's new performance appraisal systems (see Pet. App. A4-A5, A38).

[3] In *Wells*, the Board held that an employee could not be removed for "unacceptable performance" under Chapter 43 if, at the time of his removal, his employing agency had not yet fully implemented the new performance appraisal system mandated by 5 U.S.C. 4302. The issue arose out of a challenge to OPM regulations that were designed to govern the interim period between January 11, 1979, the effective date of the CSRA, and October 1, 1981, the date by which agencies were to have their performance appraisal systems established. OPM's regulations permitted agencies to remove employees under Chapter 43 during this interim period so long as the employees against whom action was to be taken had been informed of the critical elements and performance standards for their particular positions, even if the other elements of a performance appraisal system under 5 U.S.C. 4302 were not yet in place.

The Board held that OPM's interim regulations were invalid, but it stressed that it was not thereby creating a hiatus during which agencies would be prevented from taking performance-based disciplinary actions (*Wells*, 1 M.S.P.B. at 235-236). Instead, the Board ruled that agencies retained the option of proceeding under Chapter 75, so long as they could meet that chapter's higher burden of proof and "efficiency of the service" requirement (*Wells*, 1 M.S.P.B. at 202).

On the facts, the presiding official concluded that the Navy had proved petitioner's unsatisfactory performance by a preponderance of the evidence and sustained his removal under Chapter 75 (Pet. App. B10). The presiding official's decision became the final decision of the MSPB when petitioner did not seek review by the full Board. See 5 C.F.R. 1201.113.

3. Petitioner appealed the Board's decision to the United States Court of Appeals for the Federal Circuit. See 5 U.S.C. 7703(b)(1). While petitioner's case was pending before the court of appeals, the MSPB decided *Gende* v. *Dep't of Justice*, 23 M.S.P.R. 604 (1984). In *Gende*, the Board reversed the position it had taken in *Wells* and ruled that, after October 1, 1981—the date by which agencies were required to have OPM-approved Chapter 43 performance appraisal systems in place—Chapter 75 no longer could be employed to effect performance-based actions. The Board held that, after that date, such actions could be brought only under the procedures established by Chapter 43 for actions based upon "unacceptable performance." *Gende*, 23 M.S.P.R. at 607. The Board recognized that a number of courts of appeals and the Board itself had interpreted *Wells* as providing agencies with the option of proceeding under Chapter 75 in performance-based cases, and it modified its ruling in *Wells* to the extent that *Wells* had allowed for such an interpretation. *Gende*, 23 M.S.P.R. at 609-610.

4. In a divided en banc decision, the court of appeals rejected the rationale of the Board's ruling in *Gende* and held that agencies may continue to employ Chapter 75 to effectuate performance-based personnel actions taken after October 1, 1981 (Pet. App. A1-A44). The court stressed that Chapter 75 had long been used for removals based upon poor performance

and that neither the language nor the legislative history of the CSRA contained a clear expression of congressional intent to bar the continued use of that Chapter after October 1, 1981 (Pet. App. A4). The court noted that, by its express terms, Chapter 43 applies only to actions based upon "unacceptable performance," which is narrowly defined in the statute as the failure to meet a specific "critical element" of an employee's position (5 U.S.C. 4301(3), 4303(a)) (Pet. App. A14-A15). The court concluded that there was no indication that Congress intended to limit a federal agency to Chapter 43 procedures when it was faced with generalized poor performance by an employee; that both the court and its predecessor, the Court of Claims, specifically had approved the optional use of Chapter 75 procedures for performance-based personnel actions; and that other courts of appeals had done so as well (Pet. App. A23-A24).

The court of appeals declined to give special deference to the Board's interpretation of the CSRA as expressed in *Gende*, because that opinion departed from the court's analysis in prior cases and because *Gende* was inconsistent with the Board's own decision in *Wells* and other Board opinions (Pet. App. A30-A31). The court saw no basis in the plain language of Chapters 43 or 75 or in the legislative history of the CSRA for the Board's conclusion in *Gende* that performance-based actions could be taken under Chapter 75 before October 1, 1981, but not after that date (Pet. App. A31).[4]

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[4] The MSPB was permitted to intervene in the instant case in the court of appeals and asked the court to remand the case to it for reconsideration in light of *Gende* (Pet. App. A3). The court denied the MSPB's request for a remand (*id.* at A38). The dissenting members of the court of appeals

With regard to the merits, the court of appeals upheld the agency's decision that petitioner's performance was unsatisfactory (Pet. App. A39-A40). See 5 U.S.C. 7703(c). The court rejected petitioner's arguments that he had been removed as a reprisal for having reported alleged wrongdoing, that he was denied due process of law, and that he was the victim of harmful procedural error (Pet. App. A41-A42). As to whether petitioner could be removed while the Navy's application for his involuntary disability retirement was pending before OPM, the court of appeals noted that the MSPB had not addressed this issue and that the record did not indicate that the issue had been raised before the Board. The court therefore declined to rule upon the question and remanded it to the Board for appropriate action. *Id.* at A42-A44.[5]

ARGUMENT

The decision of the en banc court of appeals is correct, and it is consistent with that court's prior rulings and the rulings of other courts of appeals, the Court of Claims, and the MSPB prior to the *Gende* decision. See *Hatcher* v. *Dep't of the Air Force*, 705 F.2d 1309 (11th Cir. 1983); *Debose* v. *United States Dep't of Agriculture*, 700 F.2d 1262 (9th Cir. 1983); *Kochanny* v. *Bureau of Alcohol, Tobacco & Firearms*,

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agreed with the Board's decision in *Gende* and would have granted the Board's request for a remand (Pet. App. A45-A62).

[5] The court noted that, if it was improper for the Navy to remove petitioner while the disability retirement application was pending before OPM, he might be entitled to back pay from November 30, 1981, the effective date of his removal, to the date of OPM's decision on the disability application in January 1982 (Pet. App. A43-A44).

694 F.2d 698 (Fed. Cir. 1982); *Darby* v. *IRS*, 672 F.2d 192 (D.C. Cir. 1982); *Drew* v. *United States Dep't of the Navy*, 672 F.2d 197 (D.C. Cir.), cert. denied, 459 U.S. 1072 (1982); *Turnage* v. *United States*, 230 Ct. Cl. 799 (1982); *Young* v. *Dep't of the Navy*, 7 M.S.P.B. 7 (1981). As we demonstrate below, the court of appeals' decision is supported by the language and legislative history of the CSRA and promotes Congress's intent to provide agencies with greater flexibility in dealing with poorly performing federal employees.

The position advanced by petitioner, on the other hand, would represent a return to the complex and cumbersome procedures that prompted Congress's enactment of the CSRA. Moreover, it would have the totally unacceptable effect of leaving federal agencies with no remedy whatsoever for certain cases of poor performance. In addition, acceptance of petitioner's argument would not affect the proper disposition of this case, because petitioner is unable to demonstrate any prejudice from the procedures employed by the Navy or that he would have fared any better had the Navy proceeded against him under Chapter 43 instead of Chapter 75. Finally, review of the issue presented would in any event be premature. Petitioner offers nothing but speculation to support his contention that agencies will take advantage of the court of appeals' decision to thwart Congress's purposes in enacting the CSRA. Agencies should be afforded the opportunity to process personnel actions under the guidelines now established by the court of appeals. In the unlikely event that abuses do arise, there will be no shortage of future cases raising the issue that petitioner presents.

1. a. Prior to the enactment of the CSRA, there was no doubt that "an employee's poor performance

could be the basis for dismissal for the efficiency of the service under Chapter 75." *Kochanny*, 694 F.2d at 701. Had Congress intended to alter this long-standing practice and to prohibit the use of Chapter 75 for performance-based personnel actions, one reasonably would expect that intent to be expressed clearly in the language or legislative history of the statute. See, *e.g.*, *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 550 (1978). As the court of appeals found (Pet. App. A31), however, there is no such indication of congressional intent. In fact, both the language and the legislative history of the CSRA support the court of appeals' conclusion that Congress intended Chapter 75 to remain available for use in performance-based cases.

As noted above (see pages 2-3, *supra*), Congress amended Chapter 43 to create a new performance appraisal system based upon the "elements" of an employee's position; some elements are to be deemed "critical," and others are not. 5 U.S.C. 4302(b). Agencies are permitted to demote or to remove an employee under Chapter 43 only for "unacceptable performance," which is a statutory term of art defined as the failure to meet a "critical element" of one's position. 5 U.S.C. 4301(3), 4303(a). "Unacceptable performance" obviously was not intended to be a synonym for general poor or inefficient performance; the statutory definition of the term is limited to the failure to meet a critical element. See *Wells*, 1 M.S.P.B. at 235. Neither poor performance in the non-critical elements of an employee's position nor overall inefficiency that does not fit within the specifics of a particular critical element meets the definition of "unacceptable performance," and neither can

be the subject of a Chapter 43 proceeding.[6] Indeed, the Board conceded in *Gende* that its ruling leaves agencies virtually without a remedy for unsatisfactory performance by an employee unless the employee's poor performance relates to a "critical element." *Gende*, 23 M.S.P.R. at 616 n.18. Had Congress intended to limit agencies to the use of Chapter 43 for all actions based upon poor performance, it certainly would not have confined the applicability of that Chapter to such a narrowly defined term as "unacceptable performance." Cf. *SEC* v. *Sloan*, 436 U.S. 103, 111-112 (1978). Absent a clear statement of congressional intent, it would have been improper for the court of appeals to presume that the authority to bring performance-based actions under Chapter 75 had been repealed by implication. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974); *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 456-457 (1945).[7]

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[6] It is clear from other portions of the CSRA that Congress understood the limited scope of the term "unacceptable performance"; when Congress intended a concept broader than that encompassed by the statutory definition of "unacceptable performance," it used appropriate language. Compare, *e.g.*, 5 U.S.C. 2301(b)(6) ("inadequate performance should be corrected") with 5 U.S.C. 4303(a) (removal or demotion based upon "unacceptable performance").

[7] As previously noted, the CSRA left unchanged Chapter 75's authorization for agencies to take action against an employee "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a). Congress did add Section 7512(D) to Chapter 75, which states that that Chapter does not apply to "a reduction in grade or removal under section 4303 of this title." However, that provision does nothing more than indicate that Chapters 75 and 43 are separate and distinct and that Chapter 75 procedures do not apply to a Chapter 43 proceeding based upon "unacceptable performance." See Pet. App. A18. The Board recognized this same

b. The pertinent legislative history of the CSRA, albeit scant, also supports the court of appeals' conclusion that Congress had no intention of altering the long-standing practice of applying Chapter 75 to performance-based actions. To be sure, the Senate Report states that, in cases of "unacceptable performance," agencies would be able to take advantage of the streamlined removal procedures established by Chapter 43 (see S. Rep. 95-969, 95th Cong., 2d Sess. 46 (1978)). Nowhere, however, does the legislative history suggest that performance-based actions under Chapter 75 were to be eliminated or that Chapter 43 was intended to be exclusive. This dual approach allows agencies flexibility in remedying poor performance and is consistent with "the expressed congressional concern for the damage done to the civil service by its inability to rid itself of inept employees." *Debose* v. *United States Dep't of Agriculture*, 700 F.2d at 1266. Congress logically intended to permit an agency that could prove its case by a preponderance of the evidence and establish that its action would promote the efficiency of the service to continue to have the option of bringing performance-based charges against an "inept employee" under Chapter 75, whether or not that "inept employee" had met the "critical elements" of his position.

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point in *Wells*, 1 M.S.P.B. at 236: "Whichever action an agency chooses to pursue, it will have to comply with the procedural requirements of that Chapter." See also *Hanratty* v. *FAA*, 780 F.2d 33, 35 (Fed. Cir. 1985) ("The Board may not simply substitute Chapter 75 for Chapter 43 or vice versa after the parties have presented their evidence. Whether doing so would favor the petitioner or the agency cannot be controlling, after-the-fact switches being inherently unfair and governing procedures under the two chapters being distinct.").

As this Court has stated, one of Congress's major purposes in enacting the CSRA was to "preserv[e] the ability of federal managers to maintain 'an effective and efficient Government.'" *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Authority*, 464 U.S. 89, 92 (1983) (quoting 5 U.S.C. 7101(b)). Accord *Cornelius* v. *Nutt*, No. 83-1373 (June 24, 1985), slip op. 2. Congress created the new Chapter 43 procedures with the stated intent of increasing agencies' flexibility in dealing with employees' poor performance. S. Rep. 95-969, *supra*, at 3, 4.[8] In light of this purpose, it would be anomalous indeed to interpret Chapter 43, which provides agencies with a remedy against a poorly performing employee only if the employee fails to meet a "critical element" of his position, as the exclusive avenue for performance-based removals. As the court of appeals recognized, the new performance appraisal system mandated by Chapter 43 is a highly inexact science "in its infancy of development" (Pet. App. A34). The court of appeals clearly understood the ramifications of this fact (*id.* at A35 (emphasis added)):

> [Agencies] are encouraged by the Federal Personnel Manual to constantly review position standards and evaluation methods and to change as appropriate. * * * As we are beginning to see in appeals of removals under Chapter 43, such review is necessary. The performance ap-

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[8] Thus, contrary to the Board's suggestion in its brief supporting the petition for a writ of certiorari (at 18), there are important incentives that encourage an agency to proceed under Chapter 43 in a performance-based case, including a lower standard of proof and the absence of the need to demonstrate that its action will promote the efficiency of the service. See 5 U.S.C. 7701(c)(1)(A) and (B).

> praisal systems being utilized by agencies have not approached the level of perfection, either in defining performance standards or in the critical elements of individual positions or in evaluation techniques. Mistakes are made in setting criteria. Aspects of performance which are important to the job may not appear in the written statement of standards; others may be denominated "critical" which should not be. *When such mistakes are made by the agency, the "easy" route of Chapter 43 must be denied.* * * * *However, nothing in the statute or legislative history indicates that an employee should thereby be entitled to his position despite serious performance deficiencies where an agency can meet the heavy burdens of Chapter 75 and can show substantive compliance with merit principles.*

Accord *Hatcher* v. *Dep't of the Air Force*, 705 F.2d at 1312 (footnote omitted) ("Certain forms of substandard performance may not qualify as 'unacceptable performance' but still be of a type that justifies removal to 'promote the efficiency of the service' under Chapter 75."). Congress could not have intended that achievement of the laudable merit principles embodied in the CSRA (see Pet. App. A31-A32, A38) would come at the expense of eliminating agencies' flexibility to deal with a myriad of personnel situations that cannot always be pigeonholed into discrete "critical elements" of an employee's position.

c. The court of appeals was correct in not affording decisive weight to the MSPB's interpretation of Chapters 43 and 75 in *Gende*. First, the Board is not the only agency charged with the interpretation of the CSRA. Congress has granted the Office of Personnel Management equal if not greater authority to

administer the Act and the civil service laws generally (see, *e.g.*, 5 U.S.C. 1103(a)(5) and 4305), and OPM's interpretation of the Act, which accords with the court of appeals' decision, is as deserving of deference as that of the Board. See, *e.g.*, *Mastriano* v. *FAA*, 714 F.2d 1152 (Fed. Cir. 1983). In these circumstances, there was no compelling reason for the Federal Circuit to defer to the Board on a purely legal question of statutory construction. See, *e.g.*, *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n*, 390 U.S. 261, 272 (1968) ("[T]he courts are the final authorities on issues of statutory construction.").[9]

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[9] Indeed, the court below had good reason to decline to accept the MSPB's position. The Board's *Gende* decision was contrary to the court of appeals' prior decision in *Kochanny*. In *Kochanny*, the court of appeals was faced with the argument "that by the enactment of the [CSRA], Chapter 43 became the exclusive vehicle for removals" based upon poor performance (694 F.2d at 701). In rejecting that contention, the Federal Circuit cited *Turnage* v. *Dep't of Agriculture*, *supra*, which was decided by its predecessor court and, thus, was binding upon the court of appeals. See *South Corp.* v. *United States*, 690 F.2d 1368 (Fed. Cir. 1982) (en banc) (Court of Claims decisions rendered prior to October 1, 1982, binding on Federal Circuit). *Turnage* held that a performance-based removal action "was properly conducted * * * under Chapter 75" (230 Ct. Cl. at 802). The *Turnage* court also stated that the CSRA "established two different, mutually exclusive procedural routes for disciplining employees on the basis of unsatisfactory job performance" (*id.* at 800).

Although both *Turnage* and *Kochanny* involved performance-based personnel actions effected prior to October 1, 1981, the courts' reasoning in those cases did not turn on that fact. To the contrary, in *Kochanny* the court relied upon the Board's sweeping statements in *Wells* that " '[n]othing in § 7512 prevents actions under the provisions of Chapter 75' "

Second, the Board's views in *Gende* were neither long-standing nor consistent with its prior administrative interpretation of the CSRA. See *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287-288 n.5 (1978). As previously noted (see note 9, *supra*), the Board used sweeping language in *Wells* in holding that Congress did not intend to repeal the well-settled availability of Chapter 75 for performance-based actions (*Wells*, 1 M.S.P.B. at 202). The MSPB reached an entirely different conclusion in *Gende*, based upon the same statutory language and legislative history it considered in *Wells*. The Board attempted to explain its flip-flop by noting that *Wells* involved a personnel action effected prior to the date by which agencies were required to have Chapter 43 performance appraisal systems in place. *Gende*, 23 M.S.P.R. at 609. While that fact may have been of practical significance in *Wells*,[10] it had no effect on the Board's legal analysis and ultimate conclusion: "There is not the slightest evidence in the legislative history to suggest that Chapter 43 was ever to be a refuge for employees to escape Chapter 75. Chapter 43 originated as a relief measure for agencies and it was enacted for that purpose." *Wells*, 1 M.S.P.B. at

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in performance-based cases and that there was " 'nothing to indicate' " that the CSRA precluded agencies from proceeding under Chapter 75 in performance-based actions. *Kochanny*, 694 F.2d at 701 (quoting *Wells*, 1 M.S.P.B. at 202).

[10] The Board was rightly concerned that, if Chapter 75 procedures were unavailable to an agency that could not make use of Chapter 43 procedures because it did not have in place an OPM-approved appraisal system, the agency would be unable to remove an employee for any performance-related reasons. *Wells*, 1 M.S.P.B. at 235. Of course, the Board's decision in *Gende* sanctions just that result for performance-based personnel actions that do not fall within Chapter 43.

236. Thus, *Gende* represents a major unexplained change in position by the Board. In these circumsances, the court of appeals did not err in declining to accept the Board's most recent statement of its views.[11]

d. For the reasons previously set forth, the court of appeals' decision sensibly interprets Chapters 43 and 75 in a manner consistent with Congress's intent in enacting the CSRA to create a simpler, more flexible system for taking action against poorly performing federal employees. On the other hand, the approach suggested by the Board in *Gende* would result in the type of procedural quagmire that Congress intended to abolish when it enacted the CSRA and, as even the Board was forced to concede (see page 11, *supra*), would allow some cases of poor performance to go altogether unremedied.

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[11] The MSPB cites (Br. 7, 16) *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), in support of its argument that the court of appeals should have accepted uncritically the Board's most recent statement of its views as the proper interpretation of the CSRA. However, in *Chevron*, the Court was faced with a statutory concept that Congress intended to be interpreted flexibly. Slip op. 25. It therefore was not surprising that the agency in that case would remain flexible in its approach to the term at issue. Here, however, the issue is a fixed legal question that does not call for a flexible or variable approach. In addition, in *Chevron*, the agency's previous position had been mandated by an earlier decision of the court of appeals. *Id.* at 25-26. Thus, the subsequent change in the agency's interpretation did not represent a shift from an approach the agency had developed on its own. In *Gende*, on the other hand, the MSPB simply changed the views it freely adopted in *Wells*, based upon the same statutory language and legislative history and in the face of controlling judicial decisions to the contrary in *Kochanny* and *Turnage*.

The Board itself recognized in *Gende* that it would be foolish and unworkable to apply its prohibition against the use of Chapter 75 in performance-based cases to all situations. Therefore, without support from the statute or its legislative history, the Board immediately carved out exceptions to its newly-created interpretation of the Act (*Gende*, 23 M.S.P.R. at 615-616) and suggested that an agency still could bring a performance-based action pursuant to Chapter 75 if it demonstrated, by a preponderance of the evidence, that such an approach was proper "based on public policy or other considerations. *Gende*, 23 M.S.P.R. at 616. The Board also found it necessary to formulate standards for determining when actions are based solely upon a failure to perform and, thus, actionable only under Chapter 43. The Board framed these standards as rebuttable presumptions, involving such factors as whether the charges directly "relate to an appellant's critical or non-critical elements" or directly involve "the appellant's duties and responsibilities, or work-related tasks, functions, and objectives." *Gende*, 23 M.S.P.R. at 616-617.

It is clear simply from stating these exceptions and standards that the approach envisioned by the Board would be cumbersome and complex. Before reaching the merits of a Chapter 75 case, the Board would be required to determine whether the case met its standards for those cases and, if not, whether the case came within one of the Board's exceptions. Agencies would be concerned about using Chapter 75 for *any* performance-based case, because of the likelihood that their choice would be subjected to an after-the-fact challenge by the employee and analysis by the Board. Congress enacted the CSRA because it considered the previous system to be "time-consuming, expensive,

and aggravating," with decisions often being based upon technicalities rather than upon substance. S. Rep. 95-969, *supra*, at 40. Yet, as noted by the court of appeals, adoption of the *Gende* decision would involve "a return to the technical complexities in disciplinary procedures which Congress described as 'asphyxiating' of merit principles" (Pet. App. A32).

In addition, the *Gende* approach would prohibit an agency from taking *any* action against an employee who habitually failed to perform non-critical elements of his position or whose general poor performance did not fit within the confines of a critical element.[12] Moreover, an agency's choice of penalties in a Chapter 43 proceeding is limited to demotion or removal; no lesser penalty is permitted even if the agency considers it appropriate. *Lisiecki* v. *MSPB*, 769 F.2d 1558, 1564 (Fed. Cir. 1985), petition for cert. pending, No. 85-1058 (filed Dec. 19, 1985). Thus, on the one hand, the *Gende* rule would leave some poor performance cases incapable of remedy; on the other hand, it would *require* only the most severe penalties in all cases that come within its scope. *Gende* would convert Chapter 43 from the "relief measure for agencies" that the Board considered it to be in *Wells*, 1 M.S.P.B. at 236, to an impediment to efficient, flexible agency operations. The court of appeals was correct in rejecting an approach so clearly at odds with Congress's intent in enacting the CSRA.

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[12] The Board conceded as much in *Gende*, 23 M.S.P.R. at 616 n.18. Although an agency would retain the right to transfer an employee under such circumstances, it would be required to transfer the employee to a position at the same grade level, because it would be barred from demoting him. Thus, under the Board's approach, the problem would not be solved; it simply would be shifted to another location.

e. Petitioner argues (Pet. 17-18) that the court of appeals' decision deprives employees of important procedural rights that are made available under Chapter 43 but not under Chapter 75. See also Br. for the MSPB 18-19. On the facts of this case, petitioner's contention is without merit, because he has not demonstrated any prejudice arising out of the Navy's decision to proceed against him under Chapter 75 instead of Chapter 43.

First, Chapter 75, like Chapter 43, requires 30 days' advance written notice of an agency's proposed action against an employee and the reasons therefor (compare 5 U.S.C. 4303(b)(1)(A) with 5 U.S.C. 7513(b)(1)), and petitioner received such notice in this case (see Pet. App. B1). In this regard, therefore, petitioner's complaint (Pet. 17) that he was deprived of an important right granted under Chapter 43 is simply wrong.

Second, petitioner complains (Pet. 18) that, by proceeding against him under Chapter 75, the Navy deprived him of the opportunity to improve his performance in the 30 days prior to removal, an opportunity that is expressly provided under Chapter 43 (see 5 U.S.C. 4302(b)(6), 4303(d)). While it is true that Chapter 43 is more favorable to employees in this regard than Chapter 75, petitioner's complaint in this case rings hollow. Petitioner had more than ample notice that the Navy considered his performance to be unsatisfactory, and, had he wanted to improve, he had every opportunity to do so. On June 17, 1981, petitioner received an unsatisfactory performance evaluation (C.A. App. 29-39).[13] He received another unsatisfactory performance evaluation on

[13] "C.A. App." refers to the appendix to the government's brief in the court of appeals.

October 1, 1981 (C.A. App. 40-46). Finally, and of perhaps greatest significance, a "Joint Investigation Report" (JIR) prepared in August 1981 also rated petitioner's performance as unsatisfactory (C.A. App. 47-62). The JIR was prepared jointly by two engineers, one selected by management and the other by petitioner's union. Its findings of unsatisfactory performance are therefore entitled to special weight and should have put petitioner on full notice of the deficiencies in his work.

Equally important is the fact that petitioner *was* offered assistance in improving his work, but, as the presiding official found, he declined to accept any help. See Pet. App. B6; C.A. App. 82-83, 92. There is therefore no reason to suppose that petitioner would have fared any better had he been given a formal opportunity to improve under Chapter 43.

Finally, petitioner argues (Pet. 18-19) that he was prejudiced by the use of Chapter 75 in this case because Chapter 43 limits performance-based removals to instances of "unacceptable performance" that occurred during the one-year period immediately preceding the notice of a proposed adverse action. Petitioner complains that the presiding official in this case allowed testimony concerning instances of his unsatisfactory performance going back three years. Again, this departure from the procedures specified under Chapter 43 did not prejudice petitioner. As noted above, petitioner received two unsatisfactory performance ratings in the one-year period immediately preceding his removal, and the JIR was prepared only a few months before he was notified of the agency's intent to remove him. Any testimony concerning unsatisfactory performance prior to the one-year period specified in Chapter 43 was merely

cumulative, and, more important, was not relied upon by the presiding official in his decision.

In short, while it is true that Chapter 43 "gives employees slightly more procedural protections" than Chapter 75, *Turnage*, 230 Ct. Cl. at 801, those additional protections would not have affected the outcome in this case. In addition, the quid pro quo for the slightly enhanced procedural protections of Chapter 43 is that an agency that elects to proceed under that Chapter is held to a much less demanding standard of proof and that its choice of remedy may not be set aside (see note 1, *supra*; Pet. App. A34; *Lisiecki* v. *MSPB*, *supra*). On the other hand, an agency that chooses to proceed under Chapter 75 must prove the employee's poor performance by a higher evidentiary standard and must establish that its action will promote the efficiency of the service. 5 U.S.C. 7513(a) and 7701(c)(1)(B). Thus, providing agencies with the flexibility to select which of the two avenues to pursue does not work any prejudice to employees in general and certainly did not prejudice petitioner in this case.

In a similar vein, petitioner's speculation (Pet. 15-16) that agencies will abuse the court of appeals' decision in a manner that undercuts Congress's goals in enacting Chapter 43 is totally unsupported. Any such abuse is extremely unlikely, because of the requirement that agencies strictly follow the procedures applicable to whichever Chapter of the CSRA they choose to pursue (see note 7, *supra*). In any event, review by this Court on the basis of petitioner's speculation about the possible future effects of the decision below would be premature. Federal agencies should be afforded the opportunity to process their personnel actions in accordance with the rules established by the court of appeals' decision; there will be

ample opportunity to review the question presented by petitioner in a future case, when the Court would have the benefit of the agencies' experience under Chapters 43 and 75.

2. Petitioner also contends (Pet. 16) that his removal was improper because it was accomplished while an application for involuntary disability retirement was pending before OPM. See 5 C.F.R. 831.1206. The merits of this argument were not addressed by the MSPB or the court of appeals (Pet. App. A44). The court of appeals noted that it was unclear whether the issue was raised before the Board and remanded the question to the MSPB "for appropriate action" (*ibid.*). Because the issue was not decided below and is pending before the Board, it should not be addressed by this Court. See, *e.g.*, *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 181-182 (1976); *Wood* v. *Strickland*, 420 U.S. 308, 326-327 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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